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**Transnational Land Grabs and
Restitution in an Age of the
(De-)Militarised New
Scramble for Africa:**
A Pan African Socio-Legal
Perspective

**Edited by
Tapiwa V. Warikandwa;
Artwell Nhemachena &
Oliver Mtapuri**



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Foreword

In an age that is marked by the proliferation of theories and discourses on agency and action, what is deeply troubling is lack of attention to mounting global and neoimperial constraints that are placed on Africans and peoples of the global south more generally. The actions and agency of the African people in their struggles for restoration and independence from colonialism are being neglected in a world that is paradoxically increasingly focusing on the significance of [contextless] agency and action. While some contemporary Eurocentric scholars are emphasising contextless agency and action which they posit as extendable to “nonhuman” entities in the purported interest of what they portray as “expanded symmetrical democracy”, it is important to understand that in Africa and in the interest of justice, real democracy, freedom, liberty, agency and actions have to be sensitive and appropriate to contextual specificities of the continent. Contextless and inappropriate actions and agency cannot be celebrated except when humanity has given up on all virtues of Godliness. In fact, this is one of the devastating weaknesses of what is termed ‘globalisation’ as it seeks to uproot Africans from their contexts and from their contextually defined propriety so as to place them in a realm of contextless agency and actions; contextless freedoms, liberties and democracies which do not pay heed to African struggles for restitution and restoration of what was looted by colonists and what is being looted by neoimperial transnational corporations, that often show up in Africa as foreign investors when in fact they dispossess, exploit, loot and rob Africans of their resources.

Thus, the fatal weaknesses of existing theories and discourses on [contextless] action and agency lie in the fact that they neglect the historicity of agency and action; the ways in which agency and actions are contextualised, framed and influenced by historical colonial aspects including enslavement, dispossession, robbery, looting, exploitation and zombification of the enslaved and (neo-)colonised victims. Thus, neglected are ways in which global empire controls Africans and other people of the global south using methods of control at a

distance, taming them via global ideologies and media, controlling education, political, economic, cultural, material, religious, legal and social systems of Africa at a distance. Also neglected in the theories of action and agency are the ravaging emotional and cognitive implications of the presence of foreign militaries on the African continent for Africans who have suffered centuries of brutalities by foreign imperial armies. The transnational and foreign government land grabs [in which African peasants are dispossessed, exploited and robbed] remind Africans about the colonial experiences of dispossession and robbery. In this sense and looked at from the point of view of contemporary theories and discourses on agency and action, Africa is suffering the agency and actions of transnational corporations and foreign governments that are grabbing African land. In other words, the key shortfall of theories on agency and action particularly those that dismiss morality, ethics, hierarchy, structure and law is that they ignore the fact that agency and actions occur in contexts marked by morals, ethics, laws, cultural, political and religious structures, hierarchies. It is these structures of morality, hierarchies, ethics and laws that are ignored by transnational corporations and foreign governments currently involved in grabbing African land from peasants who are thereby being rendered utterly landless.

The book seeks to understand and shed light on the contemporary goings-on in the African continent where peasants are increasingly yelling for land restitution yet paradoxically transnational corporations and foreign governments [fortified by the presence of their foreign military bases on the African continent] are increasingly involved in land grabbing from the African peasants. The book further seeks to interrogate the paradox whereby African states are vilified by some Eurocentric and American scholars as “failed”, not worthy of sovereignty [which is often erroneously narrowly equated with Westphalian states as if precolonial Africa never had its own sovereign states] and advised to demilitarise in a paradoxical context of a new scramble for Africa. If there is a new scramble for Africa [by external forces], one would expect that African states would be strengthened so as to protect citizens yet in this whole scenario, one witnesses the opposite. Africa is not only exhorted to demilitarise

even as states like U.S.A, France and China are paradoxically erecting bases and command centres for their own militaries on the African continent. Africa is exhorted by some Euro-American “civil” society organisations and foundations to open up, to become open society, in a context where paradoxically there is the new scramble for the continent. Similarly Africa is exhorted to de-border in a paradoxical context where there is the new scramble for Africa. African states are exhorted to demilitarise in a context where security is paradoxically being privatised by the rapacious and nefarious transnational corporations and there is the emergence, on the African continent, of [transnational] private militaries constituted by western states and transnational corporations that are keen to see Africa opening up to the new scramble.

Tapwa V. Warikandwa; Artwell Nhemachena & Oliver Mtapuri

Transnational Corporations' Land Grabs and the On-going Second Mad Scramble for Africa: An Introduction

*Artwell Nhemachena, Tapiwa V. Warikandwa & Oliver
Mtapuri*

In the name of self-determination and liberty, an astounding quantity of military weapon systems has been purchased around the world. Yet these military expenditures consistently impede economic development. These nations appear to be denying their people basic economic rights in the name of military preparedness to protect the right to self-determination and freedom (William Felice, 1998: 26 cited in Harris, 2004: 10).

Vocalising a 'multicultural' approach to oppression, or remaining silent on settler colonialism while talking about colonialism, or tacking on a gesture towards indigenous people without addressing indigenous sovereignty or rights, or forwarding a thesis on decolonization without regard to unsettling/deoccupying land, are equivocations. That is, they ambiguously avoid engaging with settler colonialism...they are cryptic about indigenous land rights in spaces inhabited by people of color (Tuck, 2012: 19).

The Bilderberg group: the group which currently owns many governments around the world, through its puppet politicians, has been the main brain and the sponsor of the most talk about One World Government, often referred to as the New World Order...A few African candidates also travel around Europe and America in search for such financial support before standing for elections. Out of desperation, they sign all sorts of agreements with these sponsors which are against their national interests (Saka, 28 April 2015).

Transnational and Foreign Governments' Land Grabs in Africa

Under the moniker 'anthropocene' [African] human beings are argued, by some Western inclined scholars writing about gaia (Lovelock, 2007), to constitute the biggest threat to life on earth and yet paradoxically foreign transnational corporations and their governments are currently busy grabbing land and depriving African peasants of their livelihoods. So, in a context where empire is posturing as a protector [as indicated in the recent United Nations doctrine of 'Responsibility to Protect'] of all life on earth, the same empire is trampling on the livelihoods of Africans [peasants] whose land is currently being grabbed by the transnational corporations and by foreign governments. Generating doubts as to whether empire really protects life or it merely dangles the carrot of protecting life even as it destroys life on earth, the stark hypocrisy does not augur well with an empire that is keen to do effective public relations using vacuous notions and ideologies of democracy, human rights, justice and so on. Deemed to be an emergent 'posthuman' and 'postanthropocentric' era (Zylinska, 2014), human [African] beings are being displaced from their pieces of land as the transnational corporations and their foreign governments intensify their land grabs on the African continent. In this sense the 'posthuman', 'postanthropocentric' era, which is sadly effectively a postAfrican era, is characterised by the privileging of transnational corporations and the dispossession and impoverishment of African [human] peasants.

The attendant posthuman and postanthropocentric ethics which are deemed to be free from morals (Roden, 2014), are also argued to be against [African] human "domination", ownership and sovereignty over their land (Zylinska, 2014: 20). Thus, at a time when some [African] human beings are sadly regarded [by some institutions and governments in the West] as unsustainable, as constituting excess population and thus due for extirpation by the supposed vengeance of the resurgent Greek goddess called gaia in this anthropocene (Lovelock, 2007: 180-1); Africans are in fact already meeting the vengeful transnational corporations and their foreign governments that are currently grabbing African land. Thus, recolonizing Africa under the pretext of having been commissioned by the resurgent

Greek goddess called gaia, the transnational corporations and their foreign governments can be understood as merely repeating history in which colonists colonised Africa under the pretext of having been commissioned by colonists' religions; only that this time they are not using God as the pretext but they are using gaia as the figure of a merciless goddess-commissioner of the current violence of recolonisation.

Hidden under the contemporary discourses about cosmopolitics, including the erroneous assumptions that nature can and actively and fully plays politics, including politics of extirpation, the current recolonisation and land grabbing are spuriously justified. Dispossessed and robbed of their land, the [African] human beings are left without means of livelihood; and typifying the posthuman and postanthropocentric arguments, the African dispossessed and robbed are treated without regard to conventional ethics, morality and law. So, much like during the first scramble for Africa in the 1800s, the second on-going scramble for Africa, in this 21st century, treats the African victims with callousness, disdain and disrespect, without due regard to ethics, morality and laws. Besides, when the rule of law is enforced, it amounts to the rule of empire in the sense of it being applied primarily in the interest of maintaining empire and fortressing the privileges that empire got from (neo-)colonising and (neo-)enslaving Africans and other peoples of the global south. These rules (technologies), are continuously reinvented and recalibrated to ensure empire's continued existence and omnipresence.

If the posthuman, postanthropocentric and anthropocene eras that some scholars are popularising are to be properly analysed, then they need to be placed in the context of the on-going new scramble for Africa including the transnational and foreign governments land grabs on the African continent. Thus, looked at with critical minds and in the context of the land grabs that are taking place, the discourses around posthumanism, postanthropocentrism and anthropocene eras can be understood as, in fact, translating to a **postAfrican era** particularly when the on-going immoral, unethical, unlawful, inhuman dispossession and robbery of Africans is factored into considerations. A **postAfrican era** is, for purposes of this book, one where African autonomy, integrity, human essence, sovereignty,

cultures, societies, politics, economies, morals, technologies, laws, histories, epistemologies, ethics and ownership and control of resources are wrestled from the African peoples such that they lose their Africanity, Africanness and Afrocentrism. In this way, it is not a posthuman, postanthropocentric and anthropocene era in a universal sense because in it some in the global south [including the Africans] that are being robbed, dispossessed and set on a path to extinction while others in the global north are destined for life on an earth which they will have deliberately and conveniently depopulated. Thus, the gaia that is deemed to supposedly reawaken and resurge is not one that seeks to reverse (re-)colonisation but it is one that supports, facilitates and engages in (re-)colonisation and (re)subjugation of Africa (Nhemachena, 2016).

At a time when Western academics are popularising notions of posthumanism, postanthropocentrism, Earth jurisprudence and anthropocene, their transnational and foreign governments are busy grabbing African land and extending their sovereignty over African resources. This means that the notions of posthumanism, postanthropocentrism, Earth jurisprudence and anthropocene are meant to only apply to [dispossessed and exploited] human beings of the global south. If the anthropocene, postanthropocentrism and posthumanism are sincerely meant to bring about cessation of all human “domination”, ownership and control over nature or the earth, the question is why it is only Africans and peoples of the global south that are being dispossessed, losing control and ownership over their resources? The paradox here is that at a time when human beings are being exhorted to give-up ownership, control and “domination” over earth/nature, transnational corporations and their foreign governments are intensifying their control, domination and ownership claims over African territories, including land and other resources breaching the principles of sovereignty of indivisibility and inalienability. In this sense, the discourses on the need to relinquish ownership and control over nature/land can be understood as merely ideological facades. As Nhemachena and Warikandwa (2017) argue, it is the same transnational corporations, foreign governments and Western foundations that fund and sponsor researches and academic programmes that are behind

contemporary discourses on posthumanism, postanthropocentrism and anthropocene. In this sense, it is paradoxically the same sponsors and funders of institutions and researches which are proposing the anthropocene, posthumanism and postanthropocentrism that are acting in completely opposite ways to the researches and academic programmes that they are sponsoring. They sponsor academic programmes and researches that push for giving up “domination”, control and ownership over nature while they paradoxically intensify their domination, control and ownership not only in their territories and nations but they also intensify their dispossession and looting of African peasants’ land.

In the light of the foregoing, there is validity in Nhemachena and Dhakwa’s (2017) argument that Western (neo-)colonisers have historically relied on **discursive dispossession** in order to [cognitively] trick Africans into giving up or failing to consistently defend what is valuable to them. We therefore herein argue that discourses on anthropocene, postanthropocentrism and posthumanism are meant to operate as ideologies to discursively dispossess Africans who are already being dispossessed in the ongoing second scramble for Africa. We argue here that if discourses [such as giving up control, ownership and “domination” over nature/earth] within the anthropocene, postanthropocentrism and posthumanism were meant to apply universally then the transnational corporations, their foreign governments, foreign Western foundations and institutions would not be involved in grabbing African land. The fact that these corporations, foreign governments, foundations and institutions are funding the grabs of African land suggest that the discourses are without substance and therefore need not be taken seriously by Africans and the peoples of the global south. Besides, the contemporary and sustained resistance by descendants of colonists [who dispossessed Africans centuries ago] to give up ownership and control over African land is an indication that the discourses on anthropocene, postanthropocentrism and posthumanism are not meant to apply to them. In spite of the discourses on anthropocene, postanthropocentrism and posthumanism, the descendants and beneficiaries of colonists’ who dispossessed and looted African land are resisting African

reclamations and restitution of their lands. In fact, via transnational corporations and the pretexts of bringing in agricultural investments, they are extending their empires even as they urge Africans to desist from claiming ownership, control and “domination” over their own resources. In this context, the fundamental question is who, between Africans and (neo-)colonists, should give up “domination”, ownership and control over African land and other resources?

One of the major challenges in the contemporary dispossessive discourses and practices is that ideologies that are based on postanthropocentrism, posthumanism and anthropocene erroneously assume that Western colonialism humanised and anthropocentrised Africans. Looked at closely, it becomes evident that Western colonialism dehumanised and animalised Africans who have consequently been dispossessed, looted and disinherited. In this regard, to the extent that these ideologies presuppose that the major problem for the past centuries has been human anthropocentric ravages of the environment, Africans [colonially disinherited of their humanism and sovereignty] cannot be held accountable because they have only recently been recognised by the (neo-)imperialists as humans [albeit with watered down human rights]. In other words, for centuries of enslavement and colonialism, Africans were animalised, robbed, denied human rights and dispossessed. For this reason the [purported] shortcomings of anthropocentrism, humanism and anthropocene do not fit Africans whose autonomy, dignity, sovereignty and ownership have been trampled upon since the enslavement era. Thus, whereas for Westerners the problem, in the ideologies on anthropocentrism, humanism and anthropocene, is their anthropocentrism, humanism and the attendant anthropocene; for Africans and the colonised global south, the problem is the absence of [African] anthropocentrism, absence of recognition of [African] humanism and rights including rights to ownership and control of their land and other resources (Nhemachena, 2016). As Nhemachena (2016) argues, for postcolonial Africans the contemporary problem is not absence of animism and the attendant animalisation of Africans, rather the problem since the enslavement and colonial eras has been the animalisation and erroneous colonial consideration of Africans as animists with no notions of ownership,

control and sovereignty over their resources. These erroneous bases transcended colonial era practices to inform current logics and practices of dispossession, looting and disinheritance.

Whereas Westerners, through their institutions, academics and governments, justify their grabbing of African land on the basis of discourses on climate change, the discourses on climate change are themselves flawed as will be explained below. For this reason, the [supposed] need to grow contentious genetically modified food crops that are monopolised by Western transnational corporations like Monsanto and Syngenta (The African Centre for Biodiversity, 2015), is argued herein to be premised on a hoax. Global Research (18 January 2015) notes contentions that climate is being deliberately modified via the secret magnetic warfare capabilities of the American High-Frequency Active Auroral Research Programme (HAARP) which is designed to assist America achieve full-spectrum dominance over the planet. In this sense, the weather is weaponised (The Guardian, 16 February 2015; Global Research, 29 November 2015; Weinbergers, 2008; The Independent, 26 May 2014; Smith, 1998; Bailey *et al*, 1997; Pedersen, 2015; Austin, 2015; Bernhardt *et al*, 2016) or used to heat up the ionosphere and as a weapon to achieve the full-spectrum dominance which is a prerequisite of the emergent New World Order in which Euro-America and their transnational corporations are expecting to assume a One World Government with monopoly over the resources, including land, of the entire planet (Nhemachena and Warikandwa, 2017).

Fronting the weather, climate and [“cosmopolitical”] nature in the contemporary efforts to force Africans and peoples of the global south to grow genetically modified crops and to acquiesce in the contemporary transnational land grabs is a strategy that is well explained using Goffman’s (1999) dramaturgical model of interaction in which he holds that human beings interact by fronting their front regions [consisting of contrived desirables for presentation to the public] and hiding their back regions [consisting of the unsanitised and what may not be desirable for presentations to the public]. We argue, in this book, that transnational corporations, their foreign governments and institutions are fronting “climate change” and global food shortages in efforts to coerce Africans to accept

genetically modified crops which many African states have previously categorically rejected on the basis of the toxic effects of the crops. We also argue that the transnational corporations, foreign governments and institutions are fronting these aspects so as to legitimise the on-going scramble for Africa and the land grabs. In other words, Euro-Americans are fronting discourses on “nature” in the efforts to push Africans to get into the wagon of the New World Order, begin consuming GMOs that will bring about [African] human culling and result in the intended depopulation of the world.

We further contend that the real reason cannot be concerns with “climate change” because the same transnational corporations, foreign governments and institutions are antithetical to Africans who reclaim their land in the fertile, well-watered regions of the continent, historically monopolised by colonists and their descendants. The point here is that genuine concerns about climate change would also demand that people shift from drier areas to well-watered areas to survive. However what is baffling is that the transnational corporations, their foreign governments and institutions that pretend to be concerned about “climate change” on the continent oppose African resettling in the well-watered areas of their continent. In other words, “climate change” cannot be resolved in standardised ways; and indeed in Africa the major challenge is not necessarily “climate change” but the fact that Africans were/are dispossessed, robbed of their well-watered land and pushed to drier, poor regions of the continent. Problems emanating from colonial dispossession and looting cannot be resolved through the so called ‘climate smart agriculture’ producing contentious genetically modified crops and organisms (GMOs). GMOs are being finagled and foisted on Africans as a way to legitimise contemporary dispossession and looting.

Thus, via looting and dispossession of Africans and the consequent concentration of control and ownership over planetary land and other resources in the transnational corporations and their Western governments, the One World Order with a dictatorial and (neo-)feudalistic One World Government is being gradually constituted. So, for Startweather (2007) the One World Government is being constituted with a one unit monetary system and under a

permanent non-elected hereditary global secret society oligarch that self-selects from among their numbers, in the form of a feudal system as it was in the Middle Ages. He proceeds to argue that in the envisaged New World Order, population will be controlled by introduction of diseases, wars, deliberate starvation and famines and that in this New World Order there will be systems of World Courts, One World Policemen and One Unified Military to enforce the laws in all former countries where no national boundaries shall exist. In this regard, the coercion of Africans into consuming toxic genetically modified crops is herein considered to be a step towards the One World Order's depopulation agenda. In such a world, Africans are deprived of their ownership and control over their resources including land, water, minerals and so on which are thereby monopolised by the global secret society which owns and controls the transnational corporations and Western governments, that produce and distribute genetically modified crops to Africans.

Apart from planning the introduction of a system of welfare [which is being popularised as sharing or solidarity economy] in which those who are obedient and subservient to the One World Government will be rewarded and those who are rebellious will be starved (Startweather, 2007: 261), the New World Order will also include modified, enhanced and purpose made humanoids robots that are already being envisaged in posthumanism and postanthropocentrism (Veltman, 2015: 16). In this sense, the humanoid robots will take over employment or jobs from [African] human beings (Nhemachena, 2017); thus worsening the plight of the Africans that are dispossessed and robbed by the transnational corporations and foreign governments, which are currently grabbing African land, water, mineral and other resources. While some Africans, "civil" society organisations, some political parties and some human rights groups oppose African land reclamations on the [hideous] premise that the reclamations threaten the stability of agro-industries and employment, it is necessary to note here that the employment sector has never been reliable for Africans, never African-friendly; jobs have never been easy for Africans to find and particularly during the [IMF and World Bank imposed] neoliberal era that was ushered in soon after independence; Africans have been

massively retrenched from employment, even without them having embarked on Zimbabwe style land reclamations. Further, in a world marked by the popularity and growth of self-employment, to bank on unpredictable formal employment in transnational corporations' sweatshops and export processing zones which are, in any case, hardly employee-friendly, and which are increasingly preferring using humanoid robots instead of human employees, would be short-sightedness and profound naivety.

Scholars writing about the New World Order or the One World Government are supported by recent developments such as the Global Compact, which was entered into between transnational corporations and the United Nations, wherein the transnational corporations are allowed to participate in and determine UN policies. In the Global Compact, UN agencies like United Nations Children's Education Fund, United Nations Development Programme, United Nations Educational Scientific and Cultural Organisation intensified their partnerships with the rapacious transnational corporations (Hammel, 2005: 14; Nhemachena and Warikandwa, 2017). The same transnational corporations and Western Governments, institutions and foundations such as the Monsanto, Syngenta, World Bank, International Monetary Fund, Bill and Melinda Gates and Rockefeller Foundations are also noted as participating in the new scramble for Africa, including the on-going land grabs. Thus, there is corporate capture of African land and agriculture and this process of capture involves the G8 countries and their allies such as Bill and Melinda Gates Foundation, US government's Global Hunger and Food Security Programme, "Feed the Future", G8's Global Alliance for food security and Nutrition Africa (NAFSA) (New African, 11 November 2016).

Also worrying for Pan Africanist scholars is the concentration of United States of America military bases [which will be looked at more closely below] on the African continent, and in the global south, that is being increasingly militarised and weaponised by the United States of America, France and other countries in the global north. Worrying also is the [global] concentration of political power in a United Nations that is controlled by the global north particularly the United States of America; worrying too is the concentration of legal power

in world courts that are controlled by the global north particularly the United States and the transnational corporations. All these forms of concentrations speak to the worrisome symptoms of a New World Order and One World Government which is evidently antithetical to the people of the global south who are not only being looted and dispossessed but are also deemed and treated as excess or surplus humans due for [animistic] culling in the interest of a New World Order and One World Government imposed and monopolised by feudalistic secret societies in the global north (Mawere and Nhemachena, 2017).

The discourses on the New World Order and One World Government speak to contemporary academic debates about the value of what is called Sociology of the Future or Future Oriented Abstractions (Selin, 2008; Borup *et al*, 2006; Bell, 1996). It is noted by Selin (2008: 1878) that the Sociology of the Future is an emerging field of inquiry that works to understand future [consciousness] drawing from a mix of science and technology studies and the practice of foresight. While Borup *et al* (2006: 285-6) contend that future-oriented abstractions are among the most important objects of enquiry for scholars and analysts of innovation that prepares people for opportunities and risks; Selin (2008: 1880) argues that exploring the future tense provides a means of taking responsibility for what is to come and so foresight practitioners are interested in indicators of the future, or anticipatory knowledge. Thus, in addition to developing vocabulary and analytical perspectives with which to make sense of the promissory and future-oriented properties on innovation, networks, expectations and futures (Borup *et al*, 2006) Sociology of the Future creates room for foresight studies which promote sensitivity for detecting and disclosing invisible, inarticulate or unconscious societal motives, aspirations and preferences and of articulating them (Chia, 2004: 22 cited in Selin, 2008: 1880). Although scholars and writers on the New World Order have often been dismissed as conspiracy theorists, it is necessary to note the importance and relevance of future oriented minds that seek, on the basis of available evidence and foresight, anticipate the futures of Africa. After all, when transnational corporations, foreign governments and institutions concertedly [plan] grab African land,

there is evidence of conspiracies to dispossess and rob the Africans of the land and other associated resources for purposes of concentrating them under the control of the transnational corporations, foreign governments and foreign institutions. Invisible authority which is exercised and exerted by these transnational corporations, foreign governments and foreign institutions on others, is what we have called virtual power.

Thus, the future of Africans, after having completely lost control, ownership and sovereignty over their land, appears gloomy. The tragedy is made worse by the fact that the transnational corporations, such as Monsanto and Syngenta, that produce the contentious genetically modified organisms which have been rejected by some African governments and peoples, are coming to grab African land so that they produce the contentious GMOs on the African continent. So, the transnational corporations like Monsanto and Syngenta, and their [Western/foreign] governments are grabbing African land in order to grow GMOs which they now call 'climate smart agriculture' (CSA) (The African Centre for Biodiversity, 2015) or 'climate change crops' (Hulme, 2009). Despite the fact that more than 28 countries in the European Union including France, German, Italy, Greece, Hungary, Lithuania, Poland as well as other regions like Scotland, Wales, Northern Ireland and Belgium have forbidden farmers from growing genetically modified crops (Glyn, 2016: 1), these transnational corporations are coming to Africa to grab land and then grow genetically modified crops. Under the guise of philanthropy and fighting climate change, the Water Efficient Maize for Africa (WEMA) project and the Global Alliance seek to lay the groundwork for the uptake of genetically modified crops across the board (The African Centre for Biodiversity, 2015). They seek to shift the ownership of maize breeding, seed production and marketing exclusively into the private transnational corporations sector so as to force African farmers to grow the genetically modified crops.

The Global Alliance and Climate Change Adaptation Strategy (CAS) have been criticised by Civil Society Organisations partly for shifting the burden of climate change mitigation onto those least responsible for, yet most vulnerable to climate change (The African Centre for Biodiversity, 2015: 9). If, as is often argued, the

contemporary transnational and foreign governments land grabs in Africa are meant to resolve climate change issues, then these solutions to climate change effectively sacrifice Africans who are least responsible for climate change. Equally, if the contemporary land grabs are meant to resolve global food shortages or crises, particularly after the global crises of 2007-8, these solutions sacrifice Africans who are after all least responsible for the global crises and food shortages. Similarly, if the contemporary land grabs are meant to resolve food shortages the solutions to global food shortages are victimising African farmers who in any case manage approximately 500 million small farms and provide over 80% of the food consumed in large parts of the developing world (Actionaid, 2014: 16). Furthermore, since the GMOs are contentious and deemed to be unsafe, with Europe and other regions having tight biosafety laws (Mail and Guardian, 31 May 2013), the growing and consumption of the GMOs in Africa sacrifices the dispossessed and impoverished Africans whose land is being grabbed by the transnational corporations and their Foreign Governments. The double whammy for Africans is that they are losing their land through these land grabs and are being forced to consume GMOs, which GMOs are argued to constitute covert biological warfare. Thus, instead of deploying human beings, empire begins to deploy genetically modified organisms for purposes of decimating human beings that are considered undesirable for imperial capital's New World Order and One World Government.

(De-)Militarisation, Democracy and Recolonisation: Whither African Materialities?

While important, the contemporary hype about the need to decolonise minds and academic curricula is not adequate in a continent where African materialities have also been colonised and are being recolonised in the context of the new scramble for Africa. To purport to liberate or free minds alone in a context where African materialities remain colonised is an unnecessary utopia for Africa. In this regard, it is necessary to note that Westerners enjoy their freedoms and liberties not merely because their minds are freed or

liberated but *a fortiori* because they own and control not only their material resources but also the material resources of Africans. Thus, to purport mental liberation but in a context of unrestored material deprivations, dispossessions and robbery would constitute mirages. In other words, democracy and freedom need not only be mental or ideational but there is need to democratise materialities by way of restitution and restoration. In this sense, while Africans who decide to reclaim their land and other resources are often demonised by Western institutions, governments and “civil” society organisations, it is imperative to note that reclaiming or having one’s resources restituted is the greatest democracy African people can ever have. Envisaged here are two kinds of democracy—one being a democracy of ownership and control over one’s resources and another one being formal electoral democracy over politics (Nhemachena, 2015).

In Africa, the democracy of owning and controlling one’s own resources has been ignored, as far as Africans are concerned, for centuries since colonialism. In fact in contemporary Africa, when Africans reclaim their resources the Western institutions, governments and civil society organisations invariably divert attention by focusing exclusively on the attendant direct physical violence minus the structural violence of the resilient colonial land dispossessions and the resilient skewed (neo-)colonial ownership structures. In this respect, they conveniently ignore the centuries-old structural violence inherent in (neo-)colonial land and resource ownership structures in Africa. As Nhemachena (2016) argues, the problem in Africa is that it is only visible direct and physical violence that is privileged in Western inclined analyses and so structural systemic violence originating from the absence of restitution is neglected yet this violence is arguably more insidious and lethal. In this regard, “civil” society organisations, transnational corporations, foreign states and governments, academies and institutions, that buttressed the colonial status quo in skewed land ownership and control in Zimbabwe, effectively supported resilient colonial structural violence. The Euro-American establishments of institutions, civil society organisations, human rights groups, states and governments appear to oppose [direct physical] violence yet they

paradoxically support lethal, virulent and resilient colonial violence in a structural systemic sense.

The (re-)colonisation of African materialities is taking place in the light of the transnational corporations' land grabs as well as the setting up of foreign military and security bases on the African continent, that is paradoxically urged by the same foreign states and governments to demilitarise its own military and security establishments. Thus, although some USA army officials stress the importance of [African] demilitarisation as a crucial process in the stages of economic and social development (Mills, 1998: 16), the USA military is paradoxically militarising the African continent (Deen, 2013; Keenan, 2008). While it may be argued that the USA, European and other states are setting up their own military and security bases in African because they have got the resources, it is necessary to note that the resources that some of these countries have belong to African people who have been enslaved, colonised, dispossessed, robbed and exploited by these states for centuries (Nhemachena, 2016). In other words, the resources that are in USA and Europe are not necessarily American or European simply because they are in USA and Europe: African resources and labour power have been siphoned and remitted to USA and Europe for centuries and so the resources that Euro-America has are not necessarily theirs. In other words, some of these countries and states use stolen African resources to set up military bases and effectively recolonise the Africans who they have denied to restitution and compensation for centuries of dispossession and exploitation. Thus, while countries like South Africa are being urged to demilitarise and de-securitise establishments under the façade that demilitarisation and de-securitisation are preconditions for development and peace (Deen, 2013; Batchelor *et al*, 1998; News24, 26 March 2013), foreign governments are paradoxically busy militarising the continent and the entire world in efforts to protect their transnational corporations, businesses and fortify their strategic control over [African] resources. While the UN is actively involved in demilitarisation agendas in Africa, (Ginifer, 2013), ostensibly designed to spearhead demilitarisation and de-securitisation of the whole African region (Batchelor *et al*, 1998), the foreign governments are paradoxically

being encouraged to militarise Africa (Gardiner *et al*, 2003). The USA for instance has been encouraged by some Western scholars to set up its regional military command structures in Africa where it is argued that a strong USA sub-regional headquarters and staff focused on Africa would provide important anchor for inter-agency efforts in supporting and reinforcing military activities; reinforcing economic, political, and security initiatives of the USA agencies (Gardiner *et al*, 2003).

In fact at the time Gardiner *et al* (2003) wrote their article, 38 out of 48 countries in sub-Saharan Africa were already being managed by the U.S. European Command (EUCOM) on the premise that there were spectres of security threats emanating from Africa. While the setting up of the USA Africa Command (AFRICOM) has been justified on the basis of boosting African capacity for war against terror, bringing development to the continent and security, Keenan (2008: 16) notes that the USA needs Africa's resources notably oil, and for this reason it needs to fight off China's growing investment on the continent. The USA's AFRICOM is paradoxically justified on the pretext of the need to boost African security, capacity and operability of African armed forces assisting other US agencies fulfilling their task in Africa and wherever necessary undertaking military activities in Africa to protect America's national interests (Deen, 2013). The paradox is that while African states' militaries are booed out of developmental activities and out of civilian spheres, USA's AFRICOM has a developmental component and it works with over thirty officials from the US agencies including the US Department of State and the US Agency for International Development (USAID) which are part of the structure for AFRICOM. More worrying is the fact that in order to establish AFRICOM bases in each African country, the USA government is noted as having actually bribed the leaders of these African nations by giving them millions of dollars in exchange for accepting AFRICOM (Café Pan-Afrika, 25 October 2012).

The establishment of the USA's AFRICOM is linked to the fact that it wants to integrate African Union forces into a global military structure led by the USA chain of command (Café Pan-Africa, 25 October 2012). In this sense, it is argued that Western powers would

prefer wherever possible to get people from other countries to do the fighting, killing and dying for them (Café Pan-Afrika, 25 October 2012). Thus, much as Western states and institutions often prefer to recruit and mobilise African to fight the Western causes in Africa, foreign governments and states are noted as preferring Africans to fight, kill and die for the foreign causes on the continent. In this vein, the USA's ambitions for full-spectrum planetary dominance, the USA's development of satellite technologies and cyber warfare are critiqued as threatening the internationally agreed demilitarisation of outer space (The Guardian, 1 September 2013). For this reason it is noted that the ideology of former USA President George W Bush [as indeed all other USA Presidents] were driven by the militarized vision of "full-spectrum dominance" and the insistence that there should not be a challenger to the undisputed global reach of US power (Fisher *et al*, 2010: 104).

Although the scholarly focus is often on critiquing the USA and other Western states involved in the militarisation of the planet including outer space, others scholars like Wolfe *et al* (2008: 28) argue that the militarisation of space is for purposes of protecting the rulership of the secret society [which is behind global governance] called the illuminati. The illuminati are understood to be a [global] secret society, comprising a handful of closely related families, in the Western world, that owns and controls world banking networks, global financial institutions and global politics. They are understood to constitute a power that is secret, organised, subtle, watchful, interlocked, complete, pervasive and they control global education institutions, health, religious, political and economic institutions (Global Research, 20 January 2016). In this regard, it is noted that the secret society constitutes a shadow government that is bent on supplanting [African] nation-states' sovereignty with an all-powerful global government, corporate controlled, and checkmated by militarized enforcement: the global shadow government is noted as being controlled by gerontocrats of the families/foundations constituting the secret society (Global Research, 25 May 2014). In this regard, Global Research (20 January 2016) notes one vice chancellor stating that:

In April 2008 I was among approximately 200 vice Chancellors, Rectors and Presidents of Universities from Asia, Africa, Europe and the US at a two day Higher Education Summit for Global Development, held at the US State Department in Washington DC. The summit was addressed by five US Secretaries including US Secretary of State Condoleezza Rice. The real emphasis throughout the summit was only on one thing that universities in developing countries operate in partnership with foundations so that global problems could be solved! These are private foundations and the only way to understand this emphasis is to realise the US government is owned by those who own these foundations (Prof Mujahid Kamran Vice Chancellor of the Punjab, Lahore, Pakistan, quoted in Global Research *ibid*).

The upshot of the above is that the on-going foreign militarisation and land grabbing in Africa should be ultimately understood in terms of the global secret society that controls all the global institutions including economy, politics, religion, law, armaments and so on. The point here is that it is logical that this global secret society, by virtue of its stranglehold grip of the global economy, controls the militarisation and demilitarisation, securitisation and de-securitisation processes in the world. While the foreign militarisation of Africa is often considered to be done by the countries or states that are visibly within the public sphere, the global secret society also requires intellectual scholarly scrutiny. In the light of Bederman's (2002) observation that demilitarisation is a retributive measure, it is possible to see the contemporary Euro-American demilitarisation campaigns in Africa as retributive and against postcolonial [African] nationalist [formerly liberation war movements] governments that are propping up contemporary peasants' land reclamations. Besides, the contemporary demands for demilitarisation starkly resemble the demilitarisation of African Chiefs and Kings during the early periods of colonialism. There is therefore cause to scrutinise deeply the contemporary Western demands for African states' to demilitarise whether or not the demilitarisation is framed in terms of "enhancing civil military relations", "enhancing security of citizens", "demilitarising conservation", "reducing violence in resource [biodiversity]

conservation”, “addressing negative impacts of militarised conservation”, “reducing ‘poaching-anti-poaching dialectics and the attendant arms race in conservation realms” (Verweijen *et al*, 2016; Cock *et al*, 1998; Fayemi, 1998; Simlai, 2015). The demilitarisation of African states will not necessarily result in the demilitarisation of transnational corporations, which are in fact increasingly privately militarising and securitising the continent (Fayemi, 1998; Nhemachena and Warikandwa, 2017); also, the demilitarisation of African states will not necessarily result in the demilitarisation of Euro-American [foreign] bases on the continent of Africa. Terrifying is the fact that even prisons are increasingly being privatised - owned and controlled by the [transnational] corporations [some of which are currently criminally involved in grabbing African land] as part of their businesses of making profits out of the mainly Black prisoners (Jackson *et al*, 2009; Global Research, 28 August 2016; The Guardian, 16 June 2016). In this respect, we question why it is only the African states that are targeted for demilitarisation and de-securitisation in their own territories. In a context where African and other states in the global south are increasingly demanding restitution and compensation for enslavement and colonisation, the global secret society is arguably minded on retributive demilitarisation and ultimately recolonisation of the continent (Nhemachena, 2016).

Thus, although some argue that “rich” governments and corporations are at the fore of the land grabs which are leading to neo-colonialism (The Guardian, 22 November 2008); and although some argue that the barons that are involved in the land grabs are major banks like Goldman Sachs, JP Morgan chase, Citigroup, UBS, Deutsche Bank, Credit Suisse, Barclays Bank, Macquari Bank and so on (Global Research, 15 May 2016); it is important to note contentions that behind these banks, institutions and foreign governments, there is the secret society which is noted as bent on creating a New World Order in which they intensify their control over the planet leaving the dispossessed impoverished to starve. So, in a Goffmanian (1999) sense, some current corporations, institutions and governments can be merely the front regions or faces of [global] gerontocratic feudalistic or slaveholding individuals

lurking in the back regions or backgrounds of what appear to be modern democracies, modern economies and modern politics.

If these transnational corporations, foreign governments and international institutions are not controlled by a secret feudalistic and undemocratic society the question is why there is so much lack of democracy in these corporations and institutions that continue to see and treat the dispossessed and impoverished as cannon fodder for the expansion of their capital? In a context where the public ideologies and practices are about democracy and human rights, institutions that merely front these ideologies without practising them raise question about their hypocrisy and hidden practices. Firstly, if these corporations, governments and international institutions are not controlled by the feudalistic secret society then why is it that they trample on human rights more than they observe their own proclamations and pronouncements of these human rights? Secondly, if these corporations, governments and institutions are not controlled by the secret society then why are they not as open as they proclaim openness to be the hallmark of democracy, development and progress? When institutions, governments and corporations that sponsor open society and other such initiatives in Africa come to Africa to cobble shady land grabbing “deals”, would this not be a manifestation of secrecy and the presence of the secret society behind the international and transnational scenes? In any case, if foreign governments and international institutions are sponsored by transnational corporations and private foundations such as the Bill and Melinda Gates Foundation and the Rockefeller Foundation, the critical question is about how these governments and institutions can act freely from the funders who remain in the background or the back region in Goffman’s (1999) sense. The experience in Africa about directed aid or tied aid indicates that funders or sponsors determine the programmes and projects for which their money will be used. In short, the concerted efforts by transnational corporations, foreign governments and international institutions involved in the on-going land grabs underscore the existence of secret concerted plans to control the world and to create a New World Order in which the secret society and its transnational capital monopolise ownership and

control of planetary resources in the dispensation to be marked by Western full-spectrum planetary dominance.

In the postcolonial context Africans in countries such as Namibia, Zimbabwe, Zambia, Tanzania, Nigeria, Ghana and South Africa, who were dispossessed during the colonial era are still denied ownership and control of their resources including land (Kangwa, 2011 : 86, 87; Pilosof, 2012; Chagutah, 2013; Belinkie, 2015: 231). It is cause for wonder what the multitudes of Euro-American “civil” society organisations are doing on the African continent if they cannot effectively agitate for reclamation and restitution of African land from generations of descendants of colonists, transnational corporations and foreign governments that are currently biting even deeper into the flesh and wounds of historically dispossessed Africans. If African liberation movements were about reclaiming land and other resources looted by colonists (Mlambo, foreword to Pilosof, 2012: 2), then why aren’t there many “civil” society organisations supporting the African cause in the postcolonial era? Whose ends are the civil society organisations serving in Africa if they cannot support African struggles for reclamation of the land and other resources? In any case, how can civility in postcolonial Africa be achievable and possible in a context where restitution and reparations to the dispossessed have not been made? In other words, are the ‘civil’ society organisations not sponsored or funded by the same global secret society that controls the global economy, including the transnational corporations that are callously grabbing African land? If the “civil” society organisations cannot civilise the transnational corporations, foreign governments and international institutions that are involved in grabbing African land, then who do the “civil” society organisations want to civilise? (See Nhemachena and Bankie, 2017).

The upshot of the above is the question on how “civil” society organisations can want to “civilise” Africans without first ensuring that they get back their resources including land? The history of Western societies indicates that civility and civilisation goes hand in hand with ownership and control over ones’ resources; in fact Westerners even went further to claim ownership and control over other people’s resources and with all this they claim to have surplus

civility to export some to Africa. If civilisation and civility go hand in hand with ownership and control of resources then the logical point is that “civil” society organisations cannot claim to bring civility to Africa without restitution and reclamation of African resources. Anything else that “civil” society organisations may appear to be doing is in effect antithetical to genuine African civility. For “civil” society organisation to retain the word ‘civil’ in its nomenclature, it must earn it by showing its civility and doing the right thing lest it be prefixed by the word ‘evil’ to earn a new nomenclature of ‘evil society’. The continued Western portrayals of African land as empty, marginal, idle, degraded, largely under-populated, waste and used unproductively (Justice, 11 October 2012), underscore the continued caricaturing of Africans as backward, savage and as animals that cannot own resources. In fact, there is no basis for foreign governments and institutions or blocks like the European Union to have imposed sanction on Zimbabwe for allegedly “grabbing” Zimbabwean land: the EU, as indeed the United States of America and Britain, is itself deeply imbricated in the contemporary grabbing of African land. In other words, we argue here that Africans cannot conceivably be deemed to grab/invoke [as western media, “civil” society organisations and scholars are fond of saying] their own land—the proper contextualised term to use is Africans are reclaiming their land. Imbricated as the EU, G8 countries, World Bank, IMF, USA, Britain and so on are in the grabbing of African land across the continent, there is no basis for them to claim that there is disorderliness, chaos, crises, regression, when Africans reclaim African land. To claim that Africans who reclaim their land are disorderly, chaotic, savage and so on is in effect to simplistically and merely repeat the old colonial caricaturing of Africans as barbaric, backward, savage, uncivilised and so on yet when transnational corporations and foreign governments grab African land, they are not deemed to be disorderly, chaotic, savage barbaric and so on even as they savagely dispossess African peasants without sensitivity to their human rights. The sad thing here is that some Africans that have suffered profound mental colonisation uncritically regurgitate (neo-)colonial ideologies in bandwagonist fashions wherein anything African is summarily deemed chaotic, regressive, anarchic,

inconsequential, barbaric, invasive and not investive and so on but when the same or even worse things are done by Westerners which the African bandwagonists hastily give their nods.

Thus, when empire experiments with Africans, feeding them with contentious genetically modified crops (Mawere and Nhemachena, 2017), bandwagonists would hastily give their nods but when Africans reclaim their land so as to grow their own organic crops, the bandwagonists would deem that to be chaotic, anarchic, backward, savage and barbaric. When empire, in pretence to humanitarianism, force-feeds Africans [who are deemed by empire to be animists next to animals] with animals feeds (Nhemachena, 2017), many who are uncritical would not consider that as savagery or barbarism but when Africans decide to reclaim their land to produce their own food, the sad tendency has been to consider the concerned Africans to be savage, regressive and barbaric and to be hateful racists.

Considered to be next to animals or as animals, Africans are denied ownership of their own resources including land; deemed to be next to animal and as animals, that cannot critically think, Africans have had their land and resources stolen through the same international institutions and governments that hypocritically claim to be worried about poverty, absence of human rights, democracy, accountability, openness in Africa (Al Jazeera, 12 April 2014; Nhemachena, 2016). Similarly, deemed to be animals that cannot own resources, Africans are reduced to beneficiaries of what is produced by other people who like dog masters drop pieces of charity once in every while on the African continent. While access to and availability of charity is often regarded as a human right, it is in fact more part of animal rights than human rights because there cannot be meaningful human rights without African [human] ownership of their resources. To survive on droppings of [toxic] charity entails location in a state of animality in which ownership of one's resources is ruled out of question (Nhemachena, 2017). In this regard, contemporary "generous" researches or studies that privilege studying African *meanings* about land and other material resources [to the exclusion of studies of African restitution and reclamations] are in fact buttressing the (neo-)colonial animalisation of Africans. To

assume, as some phenomenologically-inspired studies do, that Africans can only have [multiple] meanings about their stolen land is in fact to repeat the denigration of Africans. Animals can have multiple meanings about land and other things but they cannot [claim] own the land and other resources. In other words Africans are sadly “generously” deemed to possess multiple meanings, while on the other hand transnational corporations, colonists and their descendants, and foreign governments are deemed to own the African land about which Africans can only have multiple meanings. The point here is to question why there have been so many [sponsored] studies and researches on the African [multiple] *meanings* about land and hardly any sponsored researches or studies about African *restitution and reclamations of their land*. Put differently, the question is why much of contemporary [sponsored] researches or studies are privileging African *relationships* to land rather than African *ownership and control over land*?

Deemed to be animals, Africans have historically been rendered land-resource-vulnerable and then entrapped by the colonial establishments. Colonisation was achieved substantially by first of all rendering Africans vulnerable to, droughts, diseases, epidemics and so on, such that they would not defend their land (Nhemachena, 2016). Currently African regional seed systems are being monopolised by transnational corporations as a way to make Africans vulnerable and then entrap them into the New World Order scenario in which the global secret society and its transnational corporations gain and retain full-spectrum dominance over the planet and outer space. (Neo-)colonially deemed to be animals and next to nature, Africans have been considered raw, savage, uncivilised and in need of civilisation from the West (Nhemachena, Mlambo and Kaundjua, 2016). Having been robbed of their land by transnational corporations and foreign governments, Africans are subjected to forcible regimes of genetically modified food that are not accepted in the European Union and other countries in the global north where the transnational corporations come from. As Tucker (n.d: 72) argues the regimes of genetically modified food are part of a version of eugenics whose goal is to get rid of the [African] human beings who are deemed to be weaker, believed to be a burden, unfit to reproduce,

undesirable, the chronically sick, the homeless, the mentally and physically disabled, the unemployed, the poor, racial minorities, feeble minded and so on. But apart from introducing “terminator seeds” and preventing certain groups of people deemed to be the wrong ones from breeding, the aim of genetically modified food is argued to be to induce homosexuality, promiscuity, open marriage, abortion, sterility, drug use, self-worship, nature worship and goddess worship. First of all a universal money system, a universal food authority, a world water authority, a universal tax, a new world order and a one world leader with a universal one world religion (Tucker, *ibid*: 79, 84), will be introduced.

The [enforced] animistic New World Order religion is signalled as a kind of naturalistic religion that rejects the existence of the Heavenly God but treats nature as animate, as at the level of immanence and as worth of worship. In this vein, the recent constitution of an ‘International Tribunal for the Rights of Nature and Mother Earth’ (Maloney, 2015; Whittemore, 2011) can be understood as a step in the direction of animism, normalising the worship of nature and the associated immanentism and animism that rejects the Heavenly God. It is a new religion that negates indigenous [African] people’s rights to own, control and exercise sovereignty over their resources. It is a new religion that also denies indigenous people their states, territories and other associated resources and heritages which New Age spiritualists and other proponents of animism would want to regard as [unowned] “subjects” and not objects to be owned by Africans. It is a religion that is meant to destabilise indigenous people’s sovereignty, anthropocentrism, ownership and control of their resources while on the other hand transnational and foreign governments can acquire ownership and control over African land and other resources.

What Version for Decoloniality? The Way Forward

While Ndlovu-Gatsheni (2015: 22) argues that “decoloniality is part of a continuing search for new bases by the excluded and subordinated subjectivities from which to launch themselves into a new world order”; Tuck *et al* (2012) argues that decoloniality should

not be merely a metaphor about improving our societies and academic curricula; they should not be about seeking inclusion in settler or imperial projects but that decoloniality should be more about asserting the sovereignty of indigenous people, repatriation of indigenous land and life, reclaiming their land and other resources. In this sense, Tuck *et al*'s (2012) understanding of decoloniality is different from Maldonado-Torres' (2007: 243) understanding of coloniality in terms of "long standing patterns of power that define culture, labour, intersubjective relations and knowledge production, and is maintained in books, in criteria for academic performance, in cultural patterns, in forms of domination and subordination, in common-sense, the self-image of peoples, in aspirations of self and so many aspects of modern experience". Making their different conceptualisation of decoloniality clear, Tuck *et al* (2012: 5-19) argue thus:

Within settler colonialism, the most important concern is land/water/air/subterranean earth...Land is what is most valuable, contested, required..... Settler moves to innocence are those strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all. In fact, settler scholars may gain professional kudos or a boost in their reputations for being sensitive or self-aware. Yet settler moves to innocence are hollow, they only serve the settler...Vocalizing a 'multicultural' approach to oppression, or remaining silent on settler colonialism while talking about colonialism, or tacking on a gesture towards indigenous people without addressing indigenous sovereignty or rights, or forwarding a thesis on decolonization without regard to unsettling/deoccupying land, are equivocations. That is they ambiguously avoid engaging with settler colonialism...they are cryptic about indigenous land rights in spaces inhabited by people of color...Yet we wonder whether another settler move to innocence is to focus on decolonizing the mind, or the cultivation of critical consciousness, as if it were the sole activity of decolonization; **to allow conscientization to stand in for the more uncomfortable task of relinquishing stolen land** [our emphasis]. We agree that curricula, literature, and pedagogy can be crafted to aid

people in learning to see settler colonialism, to articulate critiques of settler epistemology, and set aside settler histories and values in search of ethics that reject domination and exploitation...however the front-loading of critical consciousness building can waylay decolonization...until stolen land is relinquished, critical consciousness does not translate into action that disrupt settler colonialism.

Tuck *et al*'s (2012) argument is consonant with Frantz Fanon's (1963: 44) argument that for the colonised people land is the most essential value, because it is the most concrete and it is the land that will be used to promote dignifying livelihoods for the indigenous people. The arguments by all these scholars are also in sync with liberation struggles in Africa. For instance in Zimbabwe the focus by liberation fighters on reclaiming land and other material resources looted and stolen by the colonial settlers is underscored by the songs that liberation fighters sang. Songs about *vapambe pfumi* (looters/robbers of African wealth); *tora gidi uzvitonge* (get a gun, fight and recover your sovereignty); *vapamberhu* (looters/robbers of the soil) (Makanda *et al*, 2012; Makanda, 2011; Pongweni, 1982)-these songs underscore the importance of recovering African resources that were stolen by colonists. The Southern Time (17 June 2013) notes that: "Other songs made fun of the Rhodesians among them "*maruxa imi vapambe pfumi*" (You have lost the war you robbers of wealth) in which the choir used even vulgar words to entertain and show the anger and hatred towards the settler regime".

Thus, it is necessary to focus on decolonising Africa in ways that not only bring cessation of the current land grabs and theft of African resources but also in ways that ensure that Africans successfully reclaim their land and other resources. We argue that if Africans are hoodwinked into believing in animism which necessarily leads them to the New World Order, the net effect will not be decolonisation or decoloniality but recolonisation. As Bienefeld (1994) argues, the New World Order is witnessing a more open and explicit form of imperialism in which national sovereignty is more readily overridden by a hegemonic power pursuing its own self-defined national interests. Although Western designed human rights may help some Africans, the problem is that Western human rights are underwritten

by the transnational corporations: for instance Amnesty International, Human Rights Watch and others have well developed links with foreign governments, transnational corporations [which fund them] and they are therefore connected to the global military industrial complex (Global Research, 15 March 2016). In fact even the United Nations is tied to the transnational corporations particularly via the Global Compact within which transnational corporations determine policy of the United Nations (Korten, 2012; Inter Press Service News Agency, 22 Sept 2015).

With respect to demilitarisation and development, the problem is that Western Foundations, “civil” (evil) society organisations, foreign governments and institutions that urge demilitarisation and de-securitisation in Africa on the questionable premises of “democracy” and “development” are busy militarising the entire world. While expenditure on militaries is one concern that is raised, Frohlich *et al* (23 April 2017) note that the USA military remains the largest force on the planet, with an expenditure of US\$ 611 billion which is equivalent to 36% of all global military spending. While it may be argued that such states like the USA have the funds and wealth to establish the military bases, such Euro-American states, in fact, survive on the bases of plundering African resources to in order to fund their imperial military bases. Similarly, decoloniality cannot be premised on openness of African societies (Silova *et al*, 2008; Sudetic, 2011) because Western nations that claim to be advanced and developed are themselves not open but ruled by a global oligarchy of secret society. If democracy is about openness, we would expect Western nations, institutions and foundations to be more open including about how they acquired their wealth in colonial plunder. The fact that the transnational corporations, foreign governments, Western foundations and institutions are not open to African peasants whose land they are grabbing means that openness is not necessarily an imperative for “development” and “democracy”, in the Western model.

The challenge is that in Africa, Western foundations that sponsor revolutions and activism for freedom, human rights and liberation are the same ones (Peizer, 2005: 14) that are involved in the contemporary land grabs on the continent of Africa. Similarly, the

problem is that governments such as the USA that sponsor “civil” society organisations that are operating in Africa are the same ones that are involved in grabbing African land from peasants. In this respect Fosshagen (2014: 13) states:

The US government allegedly spent \$334, 3 million on NGOs in Egypt over 14 years, and in 2010 alone the NED spent around \$2 billion on grants to youth organisations in Egypt... In Tunisia and Egypt, Western foundations, such as Freedom House, the International Republican Institute, the Ford Foundation, the Open Society Foundations...and the NED, substantially funded NGOs working for regime change in the years leading up to the uprising...

Much as some scholars write in terms of the African ‘land question’, it is necessary to write in terms of the ‘democracy question’ in Africa. Questions under the ‘democracy question’ will include what is democracy if Africans are not allowed to reclaim and get restitution of their land? How organic to Africa are forms of democracy that ignore restitution and reclamation of what has been looted and robbed out of the continent? Are Western institutions, which neglect reclamations and restitutions of African resources, democratic? Similarly, scholars need to envisage the ‘human rights question in Africa’. Questions under the ‘human rights question’ would include how much human rights are human rights if they ignore matters of reclamation and restitution of what was robbed and looted from Africa? Are Western human rights institutions and organisations human rights based if they ignore the reclamations and restitutions of what was robbed and looted from Africans? Why is it that Western based organisations and institutions have tended to problematize only the power of African states and governments to the exclusion of the power of foreign governments, foreign states, transnational corporations and institutions which dispossess and exploit people in Africa? The postmodern revolutions in North Africa have shown that invisible neoimperial machinations are stirring chaos and anarchy, by fronting African youths, in the covert imperial wars against African leaders on the continent yet real decolonisation has to focus on destroying the very same imperial machinations.

Decoloniality should not necessarily be about Africans fighting and killing other Africans-it is *a fortiori* about pulverising imperial machinations that cause Africans to fight and kill one another, including in the contemporary land grabs. As the virus of transnational and foreign governments' land grabs in Africa shows, the problem is not narrowly about the power of African states in Africa-it is also about the misplaced power of Western corporations, governments, and institutions that, by sleight of hand, transfer their domestic problems [deceptively labelled global] to Africa such that Africans have become imperial sacrificial victims for centuries (Nhemachena, 2016).

Chapter Outlines

Artwell Nhemachena and Oliver Mtapuri's chapter two examines ways in which African states and continental resources such as land are in a state of capture. They argue that this state of capture is evidenced through on-going land grabs by transnational corporations and foreign governments which continue the old colonial practices of theft including dispossessing African peasants. The chapter further interrogates ways in which the African continent and states are increasingly losing their stewardship, ownership and control over their resources as a result of the setting up of foreign military bases on the African continent, which continent is paradoxically pressurised, by those that have captured it, to demilitarise its own states and consequently degrade its sovereignty. Thus, the chapter argues that Africa is still enslaved and captured at various levels including the continental level, regional levels, state levels as well as individual levels. Through a critical interrogation of the contemporary U.S.A aspirations for "full spectrum dominance" over the planet, the chapter examines how some states in the global north are increasingly intensifying their capture of the world, including the land resources of the African people. This chapter considers sovereignty to include the right, duty and power to re-possess land by the peasantry in the interests of fairness, moral, social, political, economic and psychological justice.

In chapter three, Bowden B. C. Mbanje; Panganai Kahuni and Darlington Mahuku critically interrogate debates on security sector reforms (SSR). They argue that the Euro-American proponents of SSR have hypocritically and increasingly been prescribing how SSR should be done in their former colonies in Africa with the objective of weakening this sector by advancing a neo-colonial agenda. The authors argue that such neo-colonial agenda is mainly propagated by civil society organizations that are funded by Western countries to advance Western interests in former European colonies in Africa. Manje and his colleagues further argue that the call for SSR in Africa is done through CSO and brainwashed neo-liberal academics under the guise of democratizing security sector institutions. The chapter also argues that the current assaults on African states' security and African states' military establishments are meant to weaken and increasingly push Africa towards a totalitarian and authoritarian New World Order dispensation with a One World Government controlled by Euro-America, possessing resource monopoly in an envisaged **de-bordered** and **flattened planet**. It is further argued that the advocates of SSR want continued access to the continent's natural resources and in this regard, they consider Africa to be **open territory or commons** for Westerners who, consequently, do not expect African states to securitise and sovereignise African resources, conveniently deemed commons in the Western parlance. The authors incisively argue that it should not be up to (neo-)imperial powers to dictate matters on African states' security and military establishments, *a fortiori* because Africans do not dictate how the West handles its military and security establishments in their Euro-American continent and states.

In chapter four, Darlington Ngoni Mahuku; Bowden B. C. Mbanje and Panganai Kahuni critically examine why the Zimbabwean military has involved itself in the political matrix, especially with respect to recent land reclamations and restitution. The Zimbabwean military elite and the Zimbabwe African National Union –Patriotic Front (ZANU-PF) politicians have reignited narratives and memories of the First and Second Chimurenga (Wars of liberation). So the Zimbabwean military institution has vowed to defend land repossession and restitution for Black Zimbabweans at

all costs. The authors ask whether the Zimbabwean military entered into a marriage of convenience with the political elites where they want to defend their reclaimed (new farms) and the benefits that come with them. They further ask why the Zimbabwean military supported land restitution rather than leave such a political issue in the hands of politicians? The chapter proceeds to examine discourses about demilitarisation in the context of the land restitution and reclamation.

Blessing Makunike's chapter five is premised on a historical analysis of the land policies and struggles for land restoration by Black Zimbabweans. This study is important and relevant to the debates on land tenure arrangements and farming systems in terms of restitution, equity, poverty alleviation, economic development, and environmental sustainability. The chapter argues that the land restoration issue has been of fundamental significance even during the liberation struggle. Hence the post-independence Zimbabwe African People's Union Patriotic Front (ZANU-PF) government continued to emphasize Black Zimbabweans' ownership and access to land as a key measure of national liberation. As such, the Zimbabwean post-independence land policies are intended to correct the colonial dispossession of African land, while ensuring equity and effective utilization of the land resource in the country. Makunike's chapter employs a historically and sociologically grounded approach of critical social theory, which places social conflicts and power relations at the centre of the analysis of land conflicts and impoverishment in Zimbabwe. It gives an historical overview of the colonial origins of the land restitution and agrarian questions. It also examines the colonial alienation and allocation of different property rights and tenure systems on the basis of race.

In chapter six, Francis Onditi meticulously examines national anthems which he argues to provide philosophical foundations for promoting national identity for resisting foreign domination, including against contemporary foreign looting of land and other resources in Africa. In this way, national anthems signal and foster a country's [the continent's] independence from (neo-)colonial robbery and domination. Onditi argues that despite their strong symbolism and nationalistic ingenuity, national anthems have

remained under-utilized in both academic and policy discourses—hence they are not fully applied in national restoration and development frameworks. Thus, the chapter argues that national anthems can promote values and norms for the full realization of ‘African potentials’—access to and ownership of land, equality and capacity to defend the continent against (neo-)colonial imperialism or any form of domination—intellectual or material.

Chapter seven is authored by Darlington Ngoni Mahuku; Bowden B. C. Mbanje and Panganai Kahuni. The authors argue that the White minority was, for a long time, unsympathetic to the plight of the landless Black majority in Zimbabwe. They were unwilling to part with land that had been stolen by colonial settlers from Blacks. The authors further argue that the situation in Zimbabwe was exacerbated by external donors who insisted on “good governance” as a prerequisite of obtaining funds for “land reform programmes”. The problem in this was that they did not insist on good governance also on the part of Tony Blair who refused to honour the British commitments to fund land redistribution in Zimbabwe—was this good governance on the part of Blair? Donors, who are paradoxically funded by the same imperial centres that opposed the land reclamation and restoration to Blacks, contended that land reform must be based on both equity and efficiency on political and economic grounds. In this regard, the authors argue that questions arise as to whether the prominence of international law should mean that national sovereignty and national law must be eclipsed by imperial international law? Mahuku *et al* further observe that the donors tried to ‘arm-twist’ the Zimbabwean government by arguing that land reclamations by Black Zimbabweans would lead to loss of “investor” confidence, shortage of foreign exchange earnings as well as impacting negatively on national food security. To their dismay the ZANU-PF led government soldiered on because they knew that many of the so-called investors are in fact fronts for (neo-)imperialism.

Oliver Mtapuri and Artwell Nhemachena’s chapter eight critically examines matters of African national sovereignty in relation to the transnational and foreign governments’ on-going land grabs in Africa. The authors argue that the struggles for liberation, by

Africans, were in pursuit of the attainment of their independence and national sovereignty. For the authors, sovereignty is important in the exercise of the supreme power and authority of the state over its citizens, its tangible and intangible resources. Sovereignty is indivisible, inalienable and is expressive of the independence and essence of a nation. Without sovereignty over their land and other resources, the African nations and their citizens cannot conceivably exercise sovereignty over what they eat or consume, and so they risk ending up eating contentious genetically modified foods that are rejected even in the Western countries. Mtapuri and Nhemachena argue that because African wars of liberation were waged to reclaim the land, that was looted during colonialism, the on-going transnational corporations' land grabs are therefore effectively reversing the aims and gains of the African struggles against (neo-)colonial dispossession; they are effecting the opposite – evictions and dispossessions - representing reversals of indigenous Africans' land reclamations.

In chapter nine, Theobald Frank Theodory critically dissects the on-going land grabs in Tanzania. He argues that for the past ten to fifteen years, the African continent has experienced waves of transnational corporations and foreign governments' land grabbing. During that period, transnational corporations and their foreign governments have seized large areas of land ostensibly for "agribusiness", "biofuel production" and "conservation" in Africa. Theobald argues that if such trends are not checked, there is a danger that smallholder farmers in Tanzania will increasingly be expelled from their traditional land and they will be left without alternative means of livelihoods or sustenance. Using two districts, Muleba and Missenyi, as case studies, Theobald's chapter unpacks these land grabs in the study area and evaluates the costs and benefits to smallholder farmers, rural households and the environment.

Martin Uadiale and Anirejuoriste Awala-Ale's chapter ten lays bare the injustices arising from contemporary transnational corporations and foreign governments' land grabs in Mali. The authors observe that prior to the development of the concept 'food sovereignty', food sovereignty was already, at an empirical level, the guiding principle of [appropriate] food systems and social security on

the precolonial African continent. It is therefore argued that culturally acceptable and nutritious food was produced by the precolonial African smallholder farmers in ways that ensured environmental sustainability through environmentally conscious methods. The authors argue that notwithstanding the historical role played by these African smallholder farmers, governments of various African countries such as Mali have continually neglected them and they sadly denigrated African smallholder farmers' ability to adapt and address the growing situation of hunger and undernourishment. Thus, transnational biotechnology corporations like Monsanto and Syngenta are cashing in on the largely (neo-)colonially induced food insecurity and lack of confidence about smallholder farmers in Africa. Producing and marketing genetically modified crops that are known to cause sterility, impotence, cancers, hormonal changes and induce homosexuality, the biotechnology transnational corporations not only have the effect of trampling on African food sovereignty but the GMOs which they produce are meant to effectively decimate the African population. Yet the authors observe that the Malian government has unfortunately put its trust in the neoliberal transnational corporations and their foreign governments which are grabbing land from African peasants in the country.

Tapiwa V. Warikandwa and Artwell Nhemachena's chapter eleven unflinchingly delve into the legal issues within the debates on the reparations of the Nama and Herero of Namibia. They argue that the atrocious killing of innocent Namas and Hereros in a bid to dispossess them of their land or economically disenfranchise them is one of the immoral conducts whose perpetrators have yet to face justice. The killings have now been classified as genocide. Warikandwa and Nhemachena note that the German government has, sadly, never officially acknowledged the genocide and steadfastly refused to pay direct compensations to the descendants of the victims. The general argument from the Germans has been that they having been providing Namibia with [phantom] "development aid" since the country attained its independence from South Africa. In the view of the Germans, this approach has been more than "generous" and suffices as settlement for the genocide. The authors argue that the Germans' insensitive response to the claims for compensation

from the Namas and Herero depict the attitude of the same people under the Nazi regime, when they considered themselves a race from the sun. Thus, it is argued that in an era driven by the human rights agenda, it is shocking for those that regard themselves as paragons of virtue to regard other human beings as inferior and not deserving of their dignity and related rights.

In chapter twelve, Samuel K. Amoo engages issues on expropriation in comparative jurisprudence. He argues that under international law, states have a sovereign right over their natural resources. In this regard, public international law also recognizes the individual's right to property. Amoo argues that the problem that could result from these potentially conflicting rights could be resolved by the application of the principle that the right of the community overrides the right of the individual. On this premise, the power of the state to extinguish the individual's right to property could only be justified on grounds of public utility, and where expropriation is justified on grounds of public utility, the individual must be compensated for the deprivation of his or her rights. The author further argues that the demands of natural justice and equity enjoin the expropriating authority to comply with the principles of natural justice since in essence the right to expropriate is discretionary. Amoo further observes that in most Southern African countries that achieved independence through liberation wars, it is common knowledge that colonial land policies and land tenure systems constituted the major causes for the liberation struggles. Therefore, at the time of independence, governments had to embark on land reform, restoration and resettlement programmes to correct the injustices of the past.

John B. Nakuta's chapter thirteen dwells on matters of ancestral lands in Namibia. In this regard, Nakuta argues that it is a notorious fact that colonialism and apartheid in Namibia were synonymous with dispossession and robbery of Africans. Through the process of colonial dispossession, certain indigenous communities lost their ancestral lands. In this regard, one may be forgiven for assuming that, logically, at the attainment of independence the issue of restitution and land reclamations would have been amongst the prime priorities of the land policies and programmes of the new post-independence

Namibian government, as a way to address the sad and unfortunate historic injustice of land dispossession and robbery of livestock. This, regrettably, is not the case though. For Nakuta, the new democratically elected government, instead, adopted a cautious approach to the emotive issue of land restitution and land reclamations. The chapter notes that a consensus Namibian resolution adopted at the 1991 Land Conference convened by the new government resolved not to entertain the issue of land restitution and reclamations of ancestral lands given the 'complexities' involved in redressing such claims. Nakuta proceeds to note that none of the postcolonial Namibian government's land reform and land redistribution policies and programmes accordingly make mention of the issue of ancestral land claims.

In chapter fourteen, Christian Harris examines Namibian mining issues within the context of land and (de-)militarisation debates. He argues that the scramble for Namibia's uranium, just like the contemporary transnational corporations' land grabs in Africa has the potential to ignite a fierce competition between rival powers and the consequences of which has the potential to threaten the sovereignty and territorial integrity of the country. Harris further argues that in Africa, so-called strategic minerals have far and large proved to be more of a "curse" than a "blessing". Superpower politics and rivalry over the continent's resources have caused more harm, to African countries, than good.

Chapter fifteen is authored by Tapiwa V. Warikandwa; Daniel Kavishe and Ndatega V. Asheela. The authors argue that it is necessary for the Namibian Government to introduce new socio-economic/socio-legal oriented transformation laws to regulate the land market. Such a regulatory process should target the limiting of the ever-increasing housing prices in Namibia. It is further argued that the recently introduced Rent Board is a classical example of such regulatory mechanisms which must protect the interests of the previously disadvantaged and currently dispossessed Namibians. However, such regulatory interventions must be implemented in a manner that maintains a sustainable economic performance of Namibia in the short and long term. The authors argue that strict regulation of markets chases away property 'investors' and

supposedly impedes economic growth. They hold that a cautious regulatory approach must therefore be adopted whilst bearing in mind the fact that free market policies, if left unchecked, will not lead to a restorative society that is desirable for the Namibian society. A balanced approach is therefore plausible.

Tapiwa V. Warikandwa's chapter sixteen critically examines the doctrine of equity in relation to South Africa's public procurement jurisprudence to address "illegal" occupation of land. He argues that in the *Lenasia* case, the Provincial Government argued that the illegal land occupiers had acted in bad faith by continuing to build the houses despite their undertaking to cease construction work. Warikandwa argues that although the Provincial Government acted within its "rights", the demolitions not only fail the test of constitutionality but also that of morality. This submission is founded on the "clean hands" doctrine of English law which requires that all parties who seek equity must come with clean hands. His chapter argues that the conduct of the Provincial Government's officials left the government with "unclean hands" which automatically disentitled it from taking legally defensible reprisal action against the illegal occupiers. Furthermore, the Constitution prohibits any conduct by government which leaves land occupiers homeless. Sadly the government in post-apartheid South Africa has often sought to evict citizens to whom it has failed to allocate land.

Chapter seventeen is authored by Tapiwa V. Warikandwa and Artwell Nhemachena. The authors argue that the issue of the human right to land is fundamental. It is argued that the majority of African indigenes are landless owing to repressive apartheid and colonial land policies and laws. Warikandwa and Nhemachena further observe that the apartheid and colonial property rights regimes have been adopted in the post-colonial era as part of the negotiated settlements under the guise of "reconciliation". Such property rights regimes mirror the colonial and apartheid land ownership regimes in which the majority of Africans do not own land yet a minority own vast tracts of land, including beyond what they actually need. The authors argue that what is forgotten by many is that access to land allows one to enjoy a number of fundamental human rights such as access to housing, food, water, right to life and many other socio-economic rights.

Denying African indigenes access to land also denies them the ability to enjoy fundamental human rights: it amounts to reducing Africans to animism and animalisations. The authors further argue that since colonialism reduced Africans to the level of animals [without human rights to ownership of their land], making postcolonial provisions for human rights to land effectively reverses the colonial failures to distinguish between Africans and animals. In this chapter, the authors underline the fact that the land rights discourse is flawed as emphasis in Africa should be placed on the human right to land. Should an inviolable human right to land be recognised in Africa, many indigenes will access fundamental human rights and Africa will realise its developmental goals. In this sense, what is needed to better the lives of Africans is not postanthropocentrism or posthumanism but the humanisation of Africans.

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Captured States and Continents? Contemporary Land Grabs and the Presence of Foreign Militaries in Twenty-First Century Africa

Artwell Nhemachena & Oliver Mtapuri

Some stranger wid pale faces came one day and drapped a small piece of red flannel down on de ground. All de black folks grabbed for it. Den a larger piece was drapped a little further on, and on until de river was reached. Den a large piece was drapped in de river and on de other side. Dey was led on, each one trying to git a piece as it was drapped. Finally, when de ship was reached, dey drapped larger pieces on de plank and up into de ship 'til dey got as many blacks on board as dey wanted. Den de gate was chained up and dey could not get back. Dat is de way Granny Judith say dey got her to America. Of course she did not even know...dat she was being enticed away. Dey just drapped red flannel to de like us draps corn to chickens to git dem on de roost at night" (Richard Jones, enslaved and interviewed in South Carolina, 1937 in National Humanities Center, 2009).

The group comprises leaders from many secret societies; powerful families, CEOs of international banking institutions, billionaires, representatives from the US Federal Reserve, the IMF, ICC, UN, NATO, the mainstream media and a few puppet politicians...Bilderberg appoints many political leaders secretly before those leaders are actually "elected" by the public. After having stolen so much oil and other mineral resources from the countries they've invaded in the past and also through puppet governments around the world, it is estimated that the group own more than 60% of the world's wealth, they own the military industry, the UN, all major international institutions, control the mainstream media and are the secret rulers of the world... (Saka, 28 April 2015).

More important than uncovering the nature of Operation New Normal, however, is recognizing the real new normal in Africa for the US military: ever-increasing missions across the continent, ever more engagement with local proxies in ever more African countries, the construction of more new facilities in ever more countries, and a string of bases devoted to surveillance activities spreading across the

northern tier of the continent. Add to this impressive build-up the three new rapid reaction forces, specialized teams like a contingent of AFRICOM personnel and officials from FBI and the Department of Justice, State and Defense....(Turse, 2014: 113)

Introduction

When scholars engage in debates about state capture, there are often hardly any reflections about the parallel logics and technologies between the *capture* and the preceding forms of *enslavement* and (*neo-*)*colonisation*. Consequently some scholars, together with the rest of the peoples of the continent of Africa, have tended to celebrate independence within paradoxical contexts of *intensified capture* by global or imperial capital that is manifesting in the form of transnational corporations, foreign governments and international institutions which also control African, academics, minds and [land] material resources. When some contemporary Africans engage in ritual denials of their intangible and tangible heritages which colonists and their descendants are supposed, in the interest of justice and law, to restitute and compensate, this is a sad indication of the effectiveness of (neo-)colonial apparatuses that capture African minds. When Africans engage in ritual condemnations and demonisation of their cultures, marriages, genealogies and families, this is also a sad reminder of the effectiveness of (neo-)colonial processes of capturing African minds. If heritages [for tangible and intangible resources] are, as they are, premised on African cultures, genealogies, families, lineages, marriages, African [customary] laws and so on, then it logically follows that denial of these African institutions amounts to denying heritages. Mentally captured and *zombified* by Euro-American epistemologies and ideologies, some Africans are now used by [well-funded] Western institutions and organisations to destroy their own cultures, families, marriages, genealogies, lineages, and laws that would otherwise serve as foundations for claiming and enjoying African heritages on land and other resources. Paradoxically, after they have destroyed the foundations of their African heritages Africans are not allowed by the

Euro-American systems to claim and own Euro-American heritages that are dangled as enticements for uncritically destroying and demonising own African heritages. If all other states, including in the Euro-American realm value their histories, their heroes, their cultures, heritages and genealogies which provide them with foundations to claim heritages [including worldwide] (McClanahan, 2012; Diamond *et al*, 2017; The Telegraph, 31 October 2013; Wineburg *et al*, 2008; Mail Online, 9 March 2017; Mirror, 3 August 2015); it becomes imperative to interrogate what has seized Africans to condemn their tangible and intangible heritages.

Thus, sadly, claims to ancestral lands are made paradoxically in contexts where some Africans are deserting African ancestry and cultures, preferring as they do Euro-American life worlds. However, as McClanahan (2012) and Nhemachena (2016) note, even the Americans and Britons remain conscious and focused on their ancestry and on their cultures-intangible and tangible heritages. In fact they are not only conscious of their heritages within their states but they are conscious and would want to retain imperial heritages including ownership and control of African land in the former colonies. McClanahan (2012: 5) argues about America thus:

We stand on the shoulders of giants; our society and political systems were forged by the accomplishments and traditions of our ancestors. Connections with those heroes are necessary to preserve our continuity with a distinctive American past. If we...ignore them, America will crumble under the false rhetoric of “progress”, “hope”, and “change”.

The upshot of the above is that when Africans are prodded, via Western epistemologies which are being used in evangelising “progress”, “hope” and “change”, to forget or abandon their heritages including genealogies, cultures and material resources, the Africans in question are in fact being encouraged to crumble. In this regard, it is important to note that it is culture and genealogies that provide for continuity and continuity is essential where matters of heritage are raised. Yet some well-funded Euro-American foundations, institutions and “civil” society organisations are directly

and indirectly soldering against African cultures, genealogies, histories and by extension against the African heritages. Thus, when empire provides Africans with “enticements” for “freedom” or “liberty” from their supposedly abusive, primitive and constraining cultures and genealogies, this in fact translates to rituals of capture for purposes of effacing the foundations of African heritages (Nhemachena, 2016). The net effect is loss of cultural and of genealogical compasses and then the sequel would be imperial capture of those that would have lost their cultural and genealogical compasses. In other words, it is not out of philanthropy that empire sponsors projects and programmes that are against African cultures, genealogies, families, marriages: the net effect of loss of these is loss of African [claims] material heritages.

Apart from the capture of individual Africans, there is also the capture of African states, and indeed the entire continent, which are mired in the resilient imperial global matrices of power (Ndlovu-Gatsheni, 2013). When postcolonial African states experience debt crises, connections are hardly made between the indebtedness and the logics of [rapacious] capture by Western and North American international capital. When loans or debts are extended to Africa by those that have and are still looting African resources, connections should be made between the debts and the resilient technologies of perverse enslavement and capture. In this sense, connections can be drawn between on one hand how Africans [in the vignette above] were entrapped and enslaved by the slave merchants who dropped pieces of cloth and on the other hand the contemporary empire that drops pieces of silver in the form of [phantom] aid to entrap and capture African states. When international protectionism including the contemporary United Nations-sanctioned notions and principles of “responsibility to protect” (Mamdani, 2010) are celebrated by some, hardly any connections are made between them and the preceding colonial “protectionism” which explains how Africa was entrapped and captured into the matrix of resilient imperial power. If enslavement is understood in terms of disabling the enslaved from protecting themselves and their resources, it would be easier to understand the states and continent of Africa as enslaved and captured. In other words, the problem in contemporary Africa is that

many have been endeared with phantom individual freedoms and liberties such that they hardly notice that their entire families, communities, states, regions and continent have been captured ideologically, epistemically, legalistically, economically, politically, socially, culturally and in many other ways. Thus, like the enslaved Africans who found themselves on boats to Europe and North America; communities, states, regions and individuals on the continent of Africa are currently on a global spaceship [driven by descendants of those that enslaved forebears of Africans] but this time many of the enslaved appear to be gleeful and chatty in their states of capture and on the global spaceship, whose destination is neither known to them nor under their control. In other words, discourses about global inclusion and inclusivity are meant to get Africans on board the global spaceship much as the enslaved Africans in the vignette were lured by boatmen onto the slave ships only to be subsequently whipped, clubbed, sacrificed, exploited and driven to destinations in *terra incognita*.

When African states are coerced, to demilitarise and de-securitise, by those that have enslaved and colonised them, the nefarious assumption is that Africa has nothing precious to securitise. The assumption is that in spite of the riches of the African continent, [which riches are even envied by those that coerce the African states to de-securitise and demilitarise] Africa is sadly expected to keep its doors open for interminable plunder by those that have looted the continent for centuries. Thus, much as the enslaved would historically not be allowed to protect and securitise themselves, the contemporary scenario is that Africans are not allowed to securitise and militarise their enslaved and captured continent. The sad logic here is that it is only the “master” who is deemed to be justified to offer protection and security and so by extension it is only the “masters” who “can” set up military bases and deploy their militaries on the African continent that paradoxically is expected to de-securitise and demilitarise its own armies and security establishments. We argue here that to possess no means of protecting or securitising oneself is the characteristic of an ideal [international] slave and therefore we critically interrogate the current discourses on [African] de-securitisation and demilitarisation in the context of the

paradoxical on-going transnational and foreign states land grabs in Africa.

This chapter examines ways in which the African states and continental resources such as land are in a state of capture evidenced through on-going land grabs by transnational corporations and foreign governments that continue the old colonial practices of accumulation, which is in fact theft, by dispossessing African peasants. The chapter further interrogates ways in which the African continent and states are increasingly losing their stewardship, ownership and control over their resources as a result of the setting up of foreign military bases on the African continent, which continent is paradoxically pressurised, by those that have captured it, to demilitarise its own states and consequently degrade its sovereignty. Thus, the chapter argues that Africa is still enslaved and captured at various levels including the continental level, regional levels, state levels as well as individual levels. Through a critical interrogation of the contemporary USA aspirations for “full spectrum dominance” over the planet, the chapter examines how some states in the global north are increasingly intensifying their capture of the world, including the land resources of the African people. This chapter considers sovereignty to include the right, duty and power to re-possess land by the peasantry in the interests of fairness, moral, social, political, economic and psychological justice.

Free but Captured: Some Mirages of Decolonisation

Although discourses about state capture have recently proliferated, it is necessary to note that the capture of African peoples and their states did not start in this 21st century but rather with the enslavement trade and the colonisation of the continent. Thus, the above vignette underscores how Africans were captured by Europeans and North Americans who sought to exploit them as slave labourers, and took them away from their own [families, communities and states] African continent. As if the enslavement was not enough, Western philosophers like John Locke (see Parekh, 1995) then used the depletion of Africa [as Africans were enslaved] as a foundation for his argument that colonised territories were

empty, constituted wastelands and were patiently waiting for the Euro-American colonists to occupy. The point here is that it requires profound arrogance for an enslaver to argue that the territories from which he/she has captured the enslaved are empty and waiting for his/her occupation or colonisation. While it may appear that there is a difference between enslavement and the subsequent (neo-)colonisation, deeper analysis would show that the two are similar in the sense that they both involved the capture of other people, whether directly or indirectly. In this regard, there is no fundamental difference between on one hand an incident where a [group] person directly captures an individual for enslavement and on the other hand a situation where the same person instead of directly capturing an individual for enslavement decides to capture the house [community, state, region or continent] in which that individual lives. In this sense, the capture of the [precolonial] African states as well as the entire African continent underscores the logic of capturing a house/state/region/continent: colonists thus shifted from capturing African individuals for enslavement to capture the entire African states and continent for colonial enslavement within the context of imperial matrix of power. In fact, to be indirectly captured in this sense is a worse form of enslavement because it targets the whole rather than [individual] parts and when the whole is captured and enslaved, the consequent enslavement thrives in an extremely lethal form. Indeed in such a situation where the whole stately/continental vessel is captured the enslaved begin to suffer delusions of freedom—they begin to think they are free even as they are on a vessel or spaceship of [disabling] bondage of colossal proportions.

So, since the colonial era, African people and their states were captured by colonists who then dispossessed, exploited, killed and starved the Africans reducing them to the level of animals. Colonialism can therefore be conceived as an intensification and amplification of enslavement because it was about the capture of the whole continent and not just individuals; as in the enslavement era when individuals were shipped to another continent. In the (neo-)colonial era in which African states and continent are captured, Africans are forced to slave on their continent and within their states: they are not necessarily transported to another continent to slave

away from home. In this respect, the capture of African minds has increasingly created Africans who are not only prepared to slave [for the sake of empire] home and away but the mental capture has also created Africans who readily give away their resources to Westerners often on premises of self-hatred manifested in quibbles about Africans being unable to utilize their own resources. The fact that even Africans who have done the actual work on commercial farms, in countries like Zimbabwe, are often deemed by fellow Africans to be unable to utilize the land independently underscores the mental capture of the self-hating and pessimistic Africans who thereby cannot fathom and capitalise on spaces of freedom to own their land resources. Thus, captured and fooled, they represent the logics that ‘the fooled and their land are soon parted’.

The imperial efforts to capture and mentally enslave Africans and their states continue to be witnessed in the imperial diversionary campaigns whenever Africans initiate projects that threaten to disrupt the imperial order of things. In this regard, when Africans embark on land restitution or land reclamation, empire is quick to describe the African efforts as mere land or agrarian reform. While the distinction between land/agrarian reform and land restitution/reclamation may appear to be negligible there are profound underlying assumptions about possibilities of ownership of land by Africans. Land restitution/reclamation implies that owners are retaking or assuming ownership over their land, whereas mere reforms can be done even by nonowners. In this regard, we argue that what has happened for instance in Zimbabwe is not mere land reform or agrarian reforms but land reclamation and restitution, with the attendant underlying assumptions about reclaiming ownership of the looted land. To reclaim stolen land is not synonymous with mere land or agrarian reform. For this reason, while the Zimbabwean process has widely been described as land reform, we register and retain reservations about such a descriptor that lightens the historical depth of the colonial looting of African land. Thus, to water down *restitution and reclamation to mere reforms* is to risk replicating erroneous colonial denials of the existence of principles of ownership of land among Africans. So, we argue that what postcolonial Africans need to do is not merely to reform land or agrarian matters, but they need

to emphasise restitution and reclamation of their land with reforms coming in an ancillaries.

Though (neo-)colonial notions of time would have us construe the situations of Africans as having progressively gotten better since the enslavement era, critical scholars would notice that in fact there has been intensification of capture and enslavement of Africans right up to the contemporary era when whole states and continents are [ideologically and materially] captured and enslaved in a global spaceship [New World Order] driven by aliens on a calculated and purposive trajectory. While the Public Protector in South Africa is the one who recently blew the whistle about state capture by the business family, the Gupta brothers (News24, 20 May 2017; Public Protector South Africa, 14 October 2016), it is important to note for purposes of this chapter that the capture of pre-colonial African states involved promises by colonists about protectionism or protection treaties and the signing of concessions with some capricious and fickle colonists (Nhemachena and Bankie, 2017). In other words, companies such as the British South African Company (BSACo) played a big role in the capture of pre-colonial African states; the capture of pre-colonial African states was also facilitated by some missionaries who played a role in tricking African kings and chiefs into signing the malafides concessions and protection treaties. Thus, the allegation of improper influence, improper relationships, improper involvement of business actors in the removal and appointment of state officials, corruption and so on that the Guptas have been accused of (News24, 20 November 2016; News24, 20 May 2017; Public protector South Africa, 14 October 2016) date far back to the enslavement and colonial eras. While the logics and technologies of enslavement reincarnate, their effectivity and performativity is constantly recalibrated to the advantage of the enslaver.

Although contemporary discourses on large scale systematic state capture have tended to focus on widespread corruption, in economic terms, for purposes of extracting private benefits (Pesic, 2007; Grzymala-Busse, 2008), it is imperative to note that states are captured in many ways. There are many different ways in which elites and other actors appropriate functions of the state by depriving it of

autonomy to act in the public interest (Fazekas *et al*, 2014: 5). Although the World Bank has defined state capture as “the efforts of firms to shape the laws, policies and regulations of the state to their own advantage by providing illicit gains to public officials (Mail and Guardian, 3 September, 2016); it is necessary to note that the World Bank itself has been noted as using its power, particularly since the era of the neoliberal economic reforms, to coerce and bribe African states to adopt the reforms (Andreasson, 2010). Similarly, while civil society organisations are often quick to condemn corruption including state capture; Bo *et al* (2003: 1124, 1125) note that interest groups can also capture states by offering money to politicians, by assassinating or threatening to assassinate politicians, by subjecting politicians to long and costly legal harassment, spoiling the good name of the politician via smear campaigns, by sponsoring adverts that personally attack the politicians. In this sense, politicians can be completely honest, without weaknesses, but nasty pressure groups develop ways to affect the policy-makers’ utility even though the policy makers have no interest in entering into a transaction with a group.

The above facts are hardly taken into considerations in writings on state capture because of the tendency to focus narrowly on business firms as the culprits together with state officials neglecting the third, fourth and fifth forces. For this reason, when some “civil” society organisations – the third force - focus on whipping up African and other states in the global south to sign up to the Rome Statute, so that they would be tried by the International Criminal Court; this can arguably constitute selective [African] state capture particularly because Euro-American states that are not members of the ICC do not suffer the same pressures to join the court (Nhemachena and Bankie, 2017) and so they retain their unencumbered impunity. Defined by the World Bank as an effort of private interests to influence how laws, rules, and regulations are shaped to pursue their own advantage, the definition includes government officials and the private sectors (Manzetti, 2010: 49; Daily Maverick, 11 April 2017: Mbaku, 2010: 25) but the definition neglects the pressures that are frequently piled on African states and governments by international institutions such as the World Bank, the International Monetary

Fund, World Trade Organisation, as well as transnational corporations many of which are currently involved in land grabs on the African continent, with unfettered impunity. While state capture is defined in terms of firms using their influence, in collusion with state officials, to block any policy reforms that might eliminate their advantages and thus to influence the design and execution of public policies to the detriment of the economy of the captured state (Mbaku, 2010; Hellman *et al* 2001; Hellman, 2000; Daily Maverick, 11 April 2017); no mention is made of foreign states and governments that directly and indirectly influence policy, legislation and the implementation of [land] policies in African states and governments – which manifest in the form of an invisible hand or in our parlance *virtual power* – the fourth force. Virtual power is potent, toxic, omnipresent and invisible to the naked eye but it coalesces with other forces to enslave for example, legislatures, judiciaries and the executive; countries and continents. In this sense, the fact that West African French colonies were forced by France to sign colonial pacts [that are still operational] which require them to compensate, to France, for the supposed gains of colonialism (Nhemachena and Warikandwa, 2017), underscores how African states are still captured in (neo-)colonial matrices and technologies of power. The demands for compensation for the supposed colonial debts, the colonial pacts that still legitimise the presence of French militaries on the African continent and in West African states, the colonial pacts that require the West African countries to deposit their reserves, not with their Central Banks but with the French Treasury all underline the breadth of state capture in Africa – an abomination and a travesty of sovereignty and self-determination.

Thus, state capture is not something unique to contemporary South Africa where state officials have been noted to be influenced unduly by the business interests including the Gupta brothers who are alleged to be associating with the South African President (Chipkin, 2016). As far as land issues are concerned, the fact that at Lancaster House negotiations for the independence of Zimbabwe, the British government secured the white farmers' ownership of land by ruling out compulsory acquisition for the first 10 years into independence, amounts to state capture of the independent

Zimbabwean state. Similarly, the fact that for the first ten years, the independent Zimbabwean state was expected to have a quota of white members of parliament underscores state capture by the British government that was keen to secure advantages for its white farmers who remained in the country. So, following Birch *et al* (2013) we can argue that when Britain sought to protect the privileged positions of white farmers in post independent Zimbabwe, there was corruption in the form of what we call pre-emptive capture of the postindependence formative states. More recently, the enactment in 2001 by the USA of the Zimbabwe Democracy and Economic Recovery Act (ZIDERA) which sought to financially punish Zimbabwe for embarking on the land reclamation (see for instance Gono, 2008) can be best understood as efforts at capturing and disciplining the Zimbabwean state. Similarly, it can be argued that when African states, fail to restitute land to Black Africans on the premise that they cannot compulsorily acquire the land or that they have no money to purchase the land from White farmers or that they are following the rule of law (Phakati, 1 June 2017); the African states are in fact captured within a modality of an unjust rule of law which does not recognise prior injustice and unlawfulness in the historical colonial dispossession and plunder of Africans. Furthermore, the structurally violent neoliberal dispensations that were foisted on post-independent African countries by the World Bank and the International Monetary Fund - the fifth force - were in fact meant to disable African states from purchasing and redistributing land to Africans. This is a matter of African states having been captured in the matrix and technologies of (neo-)colonial, (neo-)liberal capitalism.

The form of state capture premised on global dictates, even as the dictates trample on African wishes to decolonise their states, can best be understood in terms of what other scholars have called the invisible global matrix of power or global coloniality (Ndlovu-Gatsheni, 2013). Although scholars who write about global coloniality and invisible matrices of power do not link their work to matters of capture of states and continents, a close reading of literature underscores that there are matters of capture at the base of global coloniality and the invisible global matrices of power. For

instance, Ndlovu-Gatsheni (n.d: 181) conceived global coloniality as a modern global power structure that has been in place since the dawn of Euro-North American-centric modernity. He proceeds to point out that global coloniality commenced with enslavement of Black people and culminated in the contemporary global coloniality which operates as an invisible power matrix that is shaping and sustaining asymmetrical power relations between the Global North and Global South. For Ndlovu-Gatsheni, (ibid: 185-190):

It is therefore not surprising that one of the long term consequences of these types of colonial interventions has been to make some Africans to simply capitulate to the idea that what they can only do as part of making history is to adapt to a present and future made for them by others... The inscription of coloniality of power not only resulted in the “theft of history” but also in the theft of African future. African people became represented as bystanders in human history deserving to be civilised by Europeans and educated by Europeans within a world constructed and configured by Europeans...The very fact that African leaders could be told to forget about the legacy of colonialism and its present global coloniality speaks volumes about how the powerful continue to try to define for Africans the sources of African problems. The emphasis on investment and security issues speaks to the core interests of the USA.

When Africa is denied the space to makes its own decision, to decide its own course or trajectory of development, laws, politics, economics and so on, this is reminiscent of the enslavement era when Africans were portrayed as barbaric, uncivilised, incapable of ruling themselves, and as incapable of possessing their own forms or systems of government (Esq, 2003, 887, 888). Thus, in spite of the existence of complex pre-colonial systems of government and states in Africa, discourses that are meant to justify enslavement of Africans portray them as lacking in every sense. Much as the boatmen and women of the current global spaceship still believe, during the enslavement era it was only the captains of slave-ships that decided the destinations-whether it was in the West Indies, South America, Latin America or North America (Esq, ibid: 893-984). Thus, in spite

of independence in Africa, Africans have never been afforded space to recapture the power to decide the course of their own destiny. As Ndlovu-Gatsheni (2013: 50) argues,

Whenever Africans tried to capture and put the destiny of their nations into their own hands, the powerful forces of the colonial matrix of power were quicker to interrupt, de-centre and discipline the initiatives...Nothing was ever subjected to as much disciplining as African nationalism and Pan Africanism...Mental colonisation is the hardest part to decolonise and the worst form of colonialism. It stole the African souls, invaded their consciousness, destroyed and distorted their imagination of the future.

The West and North American often impose unilateral sanctions on post-independence African states that try to reclaim their land; they also control and use the international media to harass and shame the African states that reclaim their land, the West and North America also control and use central banks via the International Monetary Fund, the World Bank, World Trade Organisation (Bowling, 2011; Mail and Guardian, 20 April 2012; Mail and Guardian, 1 June 2005; News24, 12 February 2003). Africans are therefore disciplined by the deterritorialising Western tapestry of institutions and organisations that have been foisted as a master frame of reference in African policy, law and governance. The Western tapestry of media organisations and “civil” society organisations are often quick to condemn Africans that reclaim their land back from those that inherited it from [their] colonial ancestors. Thus, in Zimbabwe for instance there were summary condemnations of peasants, war veterans, public servants and elites who reclaimed their land from white commercial farmers (Mail and Guardian, 20 April 2012; The Guardian, 17 March 2001). So, in spite of the fact that they were reclaiming their land back, they were caricatured as “grabbing” and “invading” farms and paradoxically they were caricatured by Western organisations many of which have displaced African peasants without compensation in the past. In this regard, the Mail and Guardian (1 June 2005) notes about contemporary Zimbabwe thus:

Whipped into a frenzy of hypocritical outrage, the European Union (EU), Britain and the United States (US), as well as the World Bank-all of which have been responsible for millions of evictions in Africa and elsewhere as conditions for infrastructure projects-have rushed to condemn the “atrocities”...As international “monster” of the moment, Mugabe is unacceptable to Britain and the West mainly because he has chosen to evict whites and redistribute land grabbed in colonial times. The fact that the African Union and other African leaders are not prepared to condemn him for the Harare evictions reflects that they too, recognise the injustice of the colonial land ownership inheritance and do not want to see Africa bullied again by the West.

The paradox in Western critiques of the Zimbabwean land reclamation is that while they demonised Zimbabwean political leaders for allegedly giving the land to their cronies and political party members and supporters, the same Westerners were quick to try and legitimise their own monopolisation of land ownership and control via discourses on the need to attract and retain foreign “investments”. Paradoxically, the Western media is largely silent and sympathetic about the on-going land grabs and large scale projects by Western and North American transnational corporations and their governments which dispossess and displace rural African peasants without compensation (Mujere *et al* 2011: 2, 4; Mutopo, 2015). Thus, in the façade of scarcity, efficiency and the imperatives of profit (Post, 2012); African peasants are being dispossessed and displaced by transnational corporations whose primary interest is to get profits [of which due to tax evasions by transnational corporation, African countries often get next to nothing] at international markets by growing flex crops on African land (Mutopo, 2015).

Thus, in spite of the fact that transnational and foreign governments’ land grabs started way before the Zimbabweans reclaimed their land in the recent ‘fast track land reform’, and in spite of the fact that the transnational land grabs are still on going, the international media, some “civil” society organisations as well as some scholars paradoxically focused on condemning Zimbabweans for reclaiming their land. Instead of informing Zimbabweans that if

they did not take back and hold fast to their land, the on-going transnational and foreign governments' land grabs would further dispossess them, the simplistic critics focused on condemning the Zimbabwean "land grabs" and "invasions" as demonic while paradoxically, via their silence, they did not see anything wrong with on-going transnational and foreign governments' land grabs in Africa. While Zimbabweans who reclaimed their land were portrayed as "invaders" and as "land grabbers", transnational corporations and governments involved in land grabs on the African continent were seen as indispensable "investors" in spite of the fact that they in fact grab land and dispossess African on the African continent. The corollary of this is that when it is Euro-American firms or governments involved, they are called '*investors*' and when it is the indigenous people reclaiming their land, they are called '*invaders*'. In other words, Africans are arrogantly deemed by the West to be incapable of investing in their land but what they are deemed to do instead is merely to "invade" [without investing] the land.

The Euro-American efforts to capture and contain Zimbabwe via the media are reflected in a number of ways. Firstly, the land reclamations were presented as demonic and as scuttling Zimbabwe's efforts to reengage with the Western community that was deemed to bring in inevitable and salvific investment (The Zimbabwe Independent, 21 October 2016; SABC News, 3 March 2012). Secondly, the efforts to capture and contain the country were evident in the demonization of the President and a few of his allies who had allegedly grabbed 40% of the 14 million hectares of the land and consequently allegedly caused economic collapse (The Guardian, 30 November 2010). Thirdly, the land reclamation, misreported as "land grabs/invasions", was deemed to be controversial and to bring in Black farmers without the necessary farming experience (BBC News, 15 July 2000; BBC News, 24 June 2013; Mail and Guardian, 21 August 2015). So, in spite of the fact that the White farmers who had monopolised the well-watered and fertile regions of Zimbabwe used Black farm workers to do the actual work on the farms, the Blacks were reported in the Western media and other institutions as having suddenly and magically lost their skills as soon as they started to assert their land and national sovereignty as well as freedom from the White

farmers. If the White farmers employed Black farm workers as is the case, then how come the Blacks were reported as incapable, as lacking skills to farm and so on only after they started reclaiming their land from the White farmers? We regard these modalities of reporting as *neocolonial ideological apparatuses of capture* in that they assume that Blacks can only be capable when they are appendages of the Whites and cannot act as free and independent thinking agents with the capability to farm as they have always done.

Although the President of Zimbabwe was demonised for allegedly having “grabbed land” together with his cronies (Global Research, 21 February 2011), there was paradoxically hardly any condemnation of the cronyism that characterised the displeased Euro-American block that imposed sanctions on Zimbabwe. The cronyism underlying the block of Euro-American states which ganged up to impose the sanctions together with their networks of international institutions [including NGOs and “civil” society organisations that were summoned to cooperate with the USA enacted punitive Zimbabwe Democracy Economic Recovery Act] has not been condemned by some of these institutions of Western inclination. In other words, it is hardly stated that the underlying logics of the Euro-American block and the *raison d’être* for the Western funded and inclined ‘international’ institutions is to capture or grab the entire world and put or maintain it firmly within the labyrinth of Western capital. Put differently, the Euro-American imposed sanctions were effectively meant to (re-)grab and (re-)capture, return back into the matrix of Western power, the ‘fugitive’ or ‘runaway slave’ country called Zimbabwe using sanctions as a form of reverse technology to induce the maintenance of the status quo characterised by dominance by the Euro-American block and the incessant subjugation and enslavement of the majority of the people of Zimbabwe. The Western focus on condemning Zimbabweans for “grabbing” Zimbabwean land was paradoxical in that the West is itself involved in virulent and [structurally] violent international land grabbing, including in Africa. The point here is that the Western institutions, organisations and governments are often very quick to unfairly and summarily demonise Africans as violent and yet the West quietly perpetrates multiple forms of violence, symbolic violence

through the exercise of virtual power, structural violence as well as physical violence, on a world scale.

For the above reasons, we concur with Mlambo (2005: 3) who argues thus:

...to dismiss the fast track land reform as simply evidence of greed on the part of Mugabe and his government is to fail to appreciate the role that the land question played in shaping the historical trajectory of Zimbabwe since that day in 1890 when Rhodes's envoys, members of the pioneer column raised the Union Jack at Fort Salisbury and claimed the land between the Limpopo and the Zambezi as a British colony...colonial settlers and their successive governments did systematically dispossess Africans of their land without compensation throughout the colonial period...grievances over the loss of land were a major factor in African anti-colonial sentiments and the rise of African resistance in the colonial period...The end of the war in 1980, which should have addressed the land question and resolved it once and for all, merely saw the postponement of its resolution as the Lancaster House Constitution, adopted as part of the negotiated solution to the Rhodesian impasse in 1980, imposed conditions on the newly independent country that severely compromised whatever plans the incoming independent government may have had to effect meaningful land reforms that would have led to a more equitable redistribution of land and put an end to the resentment of the colonial past.

In a context where Africans and their states have been captured by Westerners for centuries; first in the enslavement trade and then in the colonial projects, the on-going discourses about state capture in Africa, and South Africa in particular, do not do justice to African history. The transnational corporations that pioneered colonisation are still with us trawling the continent and directly or indirectly dictating terms of reference for African states and governments. The same transnational corporations still trawl the continent dictating terms of trade, investments, concessions and conditions for repatriation of profits. The same transnational corporations trawl the continent in the masquerade of "civil" society organisations which

they fund to do public relations exercises for them on the continent as wolf in sheep skin in conduct and practice even incorporating the so-called local civil society representing incorporation by deceit. It is incorporation by deceit because the local civil society organisations do not know what game they are playing and its consequences and to whose benefit. In many ways, it is a case of shooting one's self. In a context where, notwithstanding independence, Africa is still trapped in the invisible global matrix of power, discourses about state and continental capture need not be narrowed to a particular state; conceptualising state capture in terms of individual states when in fact it is continent wide cripples solutions. The entire continent and indeed the global south are captured in this invisible global matrix of power which largely explains their underdevelopment, viral conflicts and impoverishment. Discourses of state capture and proposals for solutions need to be broad and to be pitched at the continental level because every African state is captured and this is the reason why Africa is not making African-defined progress. The question we would pose here is who would milk a cow that is in motion? In this respect Africa which has, since the enslavement era, been turned by empire into its milk cow has had its mobility, meaning development, stalled because empire cannot conceivably milk a cow that is in motion. The problem in the field of development studies is that Westerners who milk Africa pretend that they are genuinely interested in its motion or development and they often even compare the cow they are milking to themselves. It is the warped logic of a slave master who signs that they are developing the slave that they have captured for purposes of cheap labour.

Thus, in a context where some West African Francophone states are also still captured and trapped in colonial pacts where they are required by France to pay compensation for being colonised, on the presupposition that colonialism was beneficial to them (Nhemachena *et al* 2017), it is parochial to consider state capture to be only happening in South Africa or in isolated places on the continent. Similarly, in a context where African states have been trapped and captured by international institutions such as the World Bank and the International Monetary Fund, discourses about state capture need to be broadened so that they reflect the breadth of state and continental

capture by the Western international organisations that often come on to the continent under the façade of philanthropic partners across different institutions be they economics, politics, defence, security, education, culture and so on. If partnerships are about capturing and swallowing others then Africa needs to rethink the so called Western partnerships, of which deceptive logics are in any case evident right from the colonial era. While some of the international organisations such as the World Bank appear to be against state capture and corruption, they are at the forefront of state capture and corrupt activities on the continent. The fact that organisations like the World Bank and the International Monetary Fund are reported to have bribed some African ministers so that they would agree to the implementation of the deleterious Economic Structural Adjustment Program (Andreasson, 2010) points to the absence of sincerity by some international organisations that claim to be against corruption and state capture while they are in fact leading in the activities of corruption and state capture. In this sense, we further argue here that what has been termed the debt trap is in fact a form of state capture utilised by the Bretton Woods institutions to impose disabling conditionalities on African states which they deemed to be indebted to them notwithstanding the centuries old dispossession and exploitation of the Africans by the same Westerners who now control these institutions that use the proceeds from enslaving and colonising African to entrap Africa into a state of capture (Nhemachena, 2015). These conditionalities represent the new technologies of enslavement that replace the physical metal chains of the days of slavery. These technologies are deceptive because they let Africans claim and celebrate freedom when in fact they are entrapped and captured with little or no room to manoeuvre.

Although Africa has notionally had independence, it is still captured in the meshworks, cobwebs and networks (see Ingold, 2011; Latour, 2005) of international organisations including the World Bank, International Monetary Fund, transnational corporations, as well as in United Nations networks and meshworks of organisations over which African countries and states have very little, if any, control. These are grids and systems of deception and theft. The (neo-)liberal dispensation and the attendant conditionalities that

retrenched African states from policy making and from controlling national economies can be understood in terms of the entrapment and capture of African states by the Bretton Wood institutions. The impoverishment of the peoples of the continent can similarly partly be understood in terms of the entrapment and capture of African states and continent by the Bretton Wood institutions that then postured as the saviours of the continent. The contemporary support [by the World Bank, the International Monetary Fund and transnational corporations] of the contemporary land grabs being executed by the transnational corporations and by western governments underscores their support for African state and continental capture by the land-grabbing transnational corporations and western governments. In this sense, the capture of states and continents is a function of entrapping, ensnaring, capturing and controlling their economies-in this regard the transnational corporations and foreign governments that are involved in and supporting transnational land grabs in Africa are in fact deeply involved in processes of Africa state and continental capture with no exoneration. Once captured, the *weakened* African states are then paraded as *weak* states; the *impoverished* African states are then paraded as *poor* states; while it is the West, Western backed “civil” societies organisations and Western corporations that have failed to restitute African land and other resources, Western media are fond of describing African states as “failed states”; the *robbed* African states are similarly paraded as *Third World* states (Nhemachena, 2016)-in all these, the *transnational loot committees* masquerading as [agricultural] *investors* are shielded from scrutiny.

The capture of African economies and states is traceable to the pre-colonial Western protectionist treaties which were dangled to pre-colonial African chiefs and Kings some of whom shrewdly declined to subject themselves to the protection of Western governments (Nhemachena *et al*, 2017). Similarly the entrapment and capture of pre-colonial African states was a function of chicanery by Westerners who came in as traders, hunters and missionaries only to subsequently grab African land and mineral resources and exploit African labour in forced labour regimens. The dispossession of Africans with regard to their land, cattle, sheep, goats and mines

served as a modality of capture in the sense that the colonial arrogation of the resources of others, by extension, effectively serves to control those that have been deprived of their resources. In other words, the (neo-)colonial impoverishment and dispossession of Africans was meant to be a means of capturing and controlling the thereby impoverished and dispossessed Africans. The underlying logic is that it is easier for empire to [indirectly] capture and control the impoverished than it is to capture and control the intact, wealthy, sovereign and autonomous peoples. A rich Africa poses a threat to the Euro-American block. As such, the wealth of Africa is at the root of the machinations of the Euro-American block as reflected by the block's actions, logics and technologies of enslavement that they have been deploying from generation to generation to keep Africa under check and subservience. The result is the emergence of technologies of enslavement that are stubborn, virulent and vicious and often virtual.

The upshot of the above is that an economically weakened African continent that is denied ownership, control, restitution, compensation and reclamation of its resources is perpetually dependent on the Euro-American and other "masters". Makinda *et al* (2015: 63) capture the challenges of the African Union very well when they note that:

The organisation has been struggling financially as a result of member states defaulting on their payments, making late payments, or withholding contributions-for different reasons. Donors, meanwhile, only fund projects that they have identified and whose implementation they control. This last form of funding is also unsustainable since the "partners" can attach strings that make it difficult for the AU to spend the money.

Thus, from the practices of directly capturing the bodies of Africans during the enslavement era, empire designed new ways of capturing Africans. This was done by dispossessing Africans, capturing and depriving them of their means of subsistence as a way of structurally and indirectly forcing them to seek contracts to work in the imperial mines and factories for next to nothing. In colonial

African countries like Zimbabwe, Namibia, Tanzania, South Africa and Zambia, Africans were moved into native reserves which were dry and had poor sandy soils; they had their cattle, goats and sheep looted by the colonial settlers. In some instances when colonists wanted to entrap and capture African men, they would first entrap and capture their wives such that when the enraged husbands went to the colonial camps to look for their wives, they were captured and then the wives were released (Schmidt, 1992). In this regard, when empire uses [glittering] ideologies to capture and separate Africans along age, gender, class, political, national, ethnic lines and so on, there is always need to remember that it is not out of philanthropy-capturing Africans directly or indirectly has always been a strategy of empire. In other scenarios, the colonists captured African children [for use as labourers], in the process infusing ideologies that their parents were bad and backward. In still other scenarios, colonists captured Aboriginal children literally hunting them down and forcing them into colonial boarding schools where they were indoctrinated with colonial ideologies that turned the hapless children away from their own cultures, families, religions, epistemologies, resources, politics and societies (Churchill, 2004). In the contemporary era, and through what have come to be understood as postmodern revolutions, empire furnishes African youths with social media, revolutionary ideas and incite them against their national leaders [often] so that empire can get opportunities to install its own puppet leaders in Africa (Nhemachena and Warikandwa, 2017). Salient in all this is the fact that it is not only states that are captured but also continents and whole regions of the world. In this regard, there are other important on-going discourses, which will be examined below, that bear directly and crucially on notions of state and continental capture as well as the on-going land grabs in Africa.

Grabbed and in the Throes: Land and Foreign Military Presences in Africa

Africans celebrated independence even as former colonial powers were forcing the African states to sign colonial pacts; even as former colonial powers were securing the continued existence of their foreign militaries on the African soil and even as the heirs and

beneficiaries of colonial land dispossessions were digging their heels into the African soil. Thus, instead of witnessing increases in autonomy and sovereignty-political, economic and in other realms-Africans have been stuck in the congested poor and dry reserve or communal areas to which colonial settlers pushed them during the colonial era. Although, in the human rights discourses, it is often stated that there is freedom from slavery and forced labour, Africans who have been cramped in reserves and communal lands for centuries without respite can hardly agree that there has been effective and meaningful human rights provisions and practices since the colonial era. They cannot agree that there has been democracy, in the material senses, when they have not been allowed to reclaim their stolen land and other colonial dispossessions. In other words, the enemies of democracy and human rights are not necessarily African [states] but the colonists and their descendants who claim and retain [including by the foulest means] what has been stolen from Africans-democracy for the dispossessed and robbed in Africa is not merely about formalistic electoral politics after-all determined by the rubrics of the dispossessors and their descendants. Africa yearns for a democracy of restitution and restoration; a human rights dispensation premised on restitution and restoration.

In fact the contemporary cramped conditions in the African reserves or communal areas are reminiscent of the cramped conditions under which the enslaved Africans were transported to the Euro-American world. The only difference now is that they are cramped by the boatmen and boatwomen in a global spaceship wherein hypocritical and sham rights and freedoms are liberally and mendaciously pronounced. The rights and freedoms are hollow and empty and represent chicanery if they do not stand the test of what we shall call substantivity and materiality. Substantivity in this case means 'worth' and materiality means 'value' in a process of valorisation of those rights and freedoms.

The hypocrisy of the foreign governments, transnational corporations and international institutions is evident in the transnational and foreign governments' land grabs in Africa. While African states are often demonised by Euro-American establishments for resolving their land problems by asserting their

sovereignty and redistributing land to Blacks, the Euro-American governments and transnational corporations and institutions have been involved in land grabs which have been increasing since the late 1990s (Actionaid, 2014). Since the Euro-American governments, institutions and transnational corporations experienced “global” crises and problems such as food and financial crises of 2007-8; “climate change”; water scarcity; “unmitigated population growth rates”; increasing demand for resources, food and biofuels-they have decided to resolve these “global” problems and crises by enacting a second scramble for Africa (Actionaid, 2014; Karodia *et al*, 2014: 295). Thus, Foreign Governments, Sovereign Wealth Funds, Private Equity Funds, Transnational Corporations, Agribusiness Firms and other key players have engaged in a scramble for African resources. These liberalised “investment” regimes have also been vigorously promoted by multilateral agencies such as the OECD, World Bank and even the UN Food and Agriculture Organisation (FAO) but without equal attention to the human right to land and the wider human rights of communities and indigenous people within host African countries (Actionaid, 2014: 12-16; Karodia *et al*, 2014). Indigenous people’s human rights to land, decent livelihoods, food, water and tenure security are endangered as the communities are displaced on a scale hitherto unknown (Karodia *et al*, 2014: 296). All displacements are forced. For that reason, all displacements are typically considered herein to constitute crimes against humanity. But Western double standards foreclose these labels so as to effectively exonerate the Euro-American block that continues to trample, on the African human rights to land, with ferocity-livelihoods are decimated and tenure security is abducted.

In a postcolonial context where Africans expected relief from the cramping conditions, they are conversely effectively experiencing worsening conditions as transnational corporations are grabbing land from the impoverished, vulnerable African peasants who are displaced with neither compensation nor broader human rights considerations, with neither sympathy nor a mere sorry as common decency would demand. Thus Africans who have been anxiously waiting [for centuries] for restitution of their land are being dissuaded from “violently” and “unlawfully” reclaiming their land. Yet foreign

transnational corporations, international institutions and foreign governments and states are busy grabbing African lands including the little plots that African peasants have had to make do with since the colonial dispossession and marginalisation. In this vein, it is noted that between 2000 and 2010, a total of 500 million acres of land was grabbed, from African peasants, by foreign transnational corporations and their governments (The Guardian, 3 July 2014; New African, 11 November 2016). Many of the land deals are meant for the growing of crops or biofuels for export to richer, developed countries such that the African small-holder farmers are left without means of subsistence (The Guardian, 3 July 2014). This corporate capture of African agriculture involves a number of organisations which support it. It is financially supported by G8 countries and their allies under the façade of stimulating a “uniquely African Green Revolution”, creating New Alliance for “food security” and nutrition in Africa (NAFSA) supported by Monsanto, Syngenta, the Bill and Melinda Gates and Rockefeller Foundation’s Alliance for a Green Revolution in Africa (AGRA)(New African, 11 November 2016; Makki *et al*, 2011). Also the US government’s Global Hunger Food Security Programme, “Feed the Future”; Swedish Ministry of Foreign Affairs, UK’s DFID, USAID, the International Development Research Centre and Luxemburg; Norwegian Fertilizer Company Yara and US company called Cargill Inc. are also partners (New African, 11 November 2016; Makki *et al*, 2011; Actionaid, May 2014; Karodia *et al*, 2014). Instead of creating an African Green Revolution, a trail of suffering is created – an African Agri-Apocalypse or Armageddon among the vulnerable peasantry as their land is appropriated and their being reduced to naught and nothingness.

Some of the organisations and institutions which are involved in grabbing African land ignore warnings contained in reports about the bad consequences of their actions. In this respect, The Guardian, (3 July 2014) cites a damning report by the Rights and Resources Initiative (RRI) based in Washington DC which warned that the UN and World Bank approach to Reducing Emissions from Deforestation and Forest Degradation (REDD) is paving the way for large-scale “carbon grabs” by foreign governments and investors, putting at risk the land rights, livelihood and lives of indigenous

communities. What is more, food campaigners are noted as having accused G8 nations of reneging on the commitment they made at their L'Aquila Summit in Italy in 2009, where they pledged US\$20 billion to support 'country-owned' strategies for food security, nutrition and sustainable agriculture, reinforcing the comprehensive African Agriculture Development Program (CAADP) (New African, 11 November 2016; Actionaid, 2014).

In spite of the suffering occasioned on African peasants, some African countries have signed up for the initiatives legitimising the land grabs. Countries like Burkina Faso, Benin, Cote d'Ivoire, Ethiopia, Ghana, Malawi, Mozambique, Nigeria, Senegal and Tanzania have signed up for the initiative in which investors are guaranteed land acquisition benefits from low average wages and are given tax holidays (New African, 11 November 2016). However, as indicated above, the African countries are merely being tricked on the premise that there will be generation of employment-in fact transnational corporations are creating humanoid robots that are already taking employment, in many sectors, away from human beings (Nhemachena, 2017). While there are reports of heavy lobbying pressure, on African governments, from the transnational corporations and other institutions and organisations involved in land grabs (New African, 11 November 2016), more African countries are targeted for the transnational and foreign governments' land grabs. The targeted countries, from the global south, are South Sudan, Democratic Republic of Congo, Mozambique, Liberia, Sudan and Sierra Leone, Papua New Guinea, Indonesia, Brazil, Uruguay, Congo Brazzaville, Ethiopia, Guyana, Ghana, Cambodia, Zimbabwe, Zambia, Madagascar, Argentina, Gabon, Lao, Tanzania, Vietnam, Colombia and Senegal (Actionaid, 2014: 10).

Just like during the colonial era, the transnational corporations, Western institutions and nations that are involved in the land grabbing consider Africa to be *terra nullius* or empty land, underutilized or unproductive even if the land is occupied and owned by African peasants. As Makki *et al* (2011) correctly indicate, Africa has been repeatedly defined as empty in terms of culture, history and then subjected to dispossession and enclosures and even more sadly, with independence, it is still considered to be empty and unowned by

Africans. In order to dispossess Africans of their land, the continent is first portrayed as *terra nullius* and *res nullius*: these notions are often legitimised on the basis of spurious presentations of statistically low population densities, claims of underutilized land and of unproductive labour. While some writers like Ferguson, (2006) celebrate that the land grabs unsettle the north-south dichotomy because they involve deals between the transnational corporations, foreign governments and the non-western states, it is imperative and more productive to see the land grabs as a replication of colonial dispossession or theft. Thus, it is arguably trivial to celebrate that the theft unsettles the north-south dichotomy. There are indeed many crimes, including assassinations of anti-imperialist African leaders, corruption, and enslavement and so on, that have been committed on the African continent where some Africans and Euro-Americans have [allegedly] been accomplices; but to celebrate that these crimes unsettle the north-south divide would be unhelpful to the African victims. The problem for Africa is that peasants are being dispossessed or robbed and that there is need to find a way to stop this-in other words, the problem for Africans is not whether or not the north-south divide has been unsettled by the fact that there are accomplices from the north and south. Besides, history shows that African leaders who refused to follow Western imperialistic dictates have been assassinated, had coups and sanctions arranged and executed against them and also Africans in general are suffering the ideological, epistemic and economic capture by the Western (neo-)imperialist machinations that need to be dismantled to free Africa. The fact that the [southern] African captives are also involved in the [northern] (neo-)imperialist designs would be unhelpful. When Africans become accomplices, which is self-destruction. Capture is insidious and wicked. Therefore, Africans must divest capture from the individual, community, national right up to the continental level.

Underlying the claims that Africans are also involved in the corrupt land grabbing deals is the paradoxical notion that the Africans should, without qualifications or reservations, own the processes and results of the on-going thuggery or what ensues from it. However, looked at from the vantage point of problematic Western assumptions that Africa is *terra nullius* and *res nullius*, all these

Western assumptions do not hold water. They are problematic because they presuppose that Africans cannot own [things including their resources] while on the other hand they paradoxically presume that Africans can own policies, ideas and “deals” conceived and initiated from the West, even if they are dirty corrupt land grabbing “deals”.. Thus, Western claims and assumptions that Africans should [unreservedly] own policies and processes provided that they are conceived and initiated by Westerners is deeply problematic. As will be discussed below, Westerners since John Locke’s time have arrogantly assumed that Africa and Africans are empty *terra nullius* and *tabula rasa* and without notions of ownership yet [even as they deny Africans ownership of their own land], the same Westerners would paradoxically want Africans to admit [country] ownership of policies and corrupt “deals” which are conceived and initiated from the west. It is deeply paradoxical and flawed to claim that Africans cannot own their resources, particularly land, on the one hand and then, on the other hand, to claim that they should own policies and corrupt “deals” even if conceived and initiated in, and for the benefit of, the (neo-)imperialist centres.

The point here is that Westerners take and enjoy the liberty to contest African ownership and possession of ecologies, African identities, African [customary or indigenous] laws, they contest African epistemologies, marriages, families, they contest African property rights, including ownership of African resources; but they would hypocritically want Africans to be deemed owners of Western conceived and initiated policies particularly those that facilitate (neo-)imperial plunder. The point here is not to exonerate African leaders involved in the shady transnational and foreign governments land grabs on the continent, rather the point is that Africans cannot be deemed to be owners of Western conceived and initiated policies and “deals” while at the same time they are denied [by the Westerners] capacity to own their land. In other words, an agreement with an imperial captive is not an agreement that would warrant the nomenclature. If ownership of land is both inalienable and incontrovertible in the West in terms of private property rights, why does this not apply to African land?

In essence, the foregoing Western paradoxes originate from John Locke's (Parekh, 1995) assumption that only the colonised territories could be contested as they were regarded as "frontiers"-without governments, without notions of ownership, with empty land, with contestable identities and so on. In fact these discourses, premised on Locke's arrogant theory about the colonised peoples, are being replicated in contemporary academies where under the façade of honouring indigenous knowledge systems, peoples of the global south are portrayed as incapable of drawing distinctions between themselves and animals/nature. The indigenous people are arrogantly deemed to be neither above nature/animals nor to be anthropocentric; or to have societies and cultures. Having been put at the same level with animals and nature, Africans and other indigenous people are, within these Western formulations, then denied ownership and control over their resources (Nhemachena, 2016). Some scholars, in these (neo-)colonial discourses that are calculated to legitimise further dispossession of Africans; argue for the 'alienation of nonhuman nature', they argue for renunciation of anthropocentrically oriented ownership over nature, they argue for the necessity of letting go the assumption that nature is ours in a possessive sense to be owned for the sake of our interests; they argue for the recognition of the 'landscape anti-domination'; they argue for the recognition of 'independence' of nature; they argue for letting go of anthropocentric understandings of ownership; they argue for the release of the grip of anthropocentric possession and they argue for giving nature its "ownership rights over itself" (Hailwood, 2015: 155, 157). Such postulates of the independence of nature are being applied primarily in Africa to justify what would, under common sense, be unjustifiable.

A close look at some of the contemporary literature on the matters of ownership of resources reveals ideological links to the ongoing land grabs in Africa. Firstly, notions of animism are not helpful to Africans as these notions can [particularly if read together with contemporary literature on Earth Jurisprudence] in fact further the dispossession of Africans. In other words, if notions of animism are read together with contemporary discourses on subject-subject ontologies, the notions would legitimise the dispossession of

Africans. They would legitimise the dispossession of Africans by first spuriously presupposing that nature is a subject and then portraying nature as self-owning and not subject to ownership by Africans and other colonised people of the global south, who are first portrayed as animists. Secondly, and connected to the foregoing, the idea of animism has some connections with John Locke's problematic theory that legitimised colonialism (Bylund, 2005; Rose, 1985). Thirdly, animism theories that deny, to Africans and other people of the global south, the idea of God are designed to discount the fact that Africans' ownership of land also derives from God by whose consent they owned and possessed what colonists covert and grab. Fourthly, the erroneous notion about openness of Africa and of indigenous knowledge is meant to replicate the colonial Lockean idea that colonised territories were commons. Fifthly, the portrayals of African states and governments as lacking and needing western forms of civility are meant to replicate the Lockean notion that the natural right to property only belongs to "civil" government [which in fact paradoxically referred to colonial governments] (Arneil, 1996).

So, while scholars like Lefevre (2007: 7) argue that all sentient life is concerned with property, either instinctively or rationally and that moral behaviour was in essence the recognition of another's ownership over a given property whether the owner is present or absent, scholars inclined to the Lockean theory deny [in a colonial fashion] property ownership to the colonised peoples. While Locke and scholars aligned to his theories argue that property rights are a right and function of [colonial] government and state, Lefevre (2007: 8-9, 21) argues that ownership of property preceded the erection of [colonial] states. Lefevre (2007) further argues that while some consider property to be a right conferred by [colonial] law, a true theory of property is a natural right devolving from the fundamental principle of individuality-a man's right to himself. Lefevre (2007: 21) argues thus: "It is as impossible...for men not to have a notion of right to property, as it is for them to want the idea of personal identity. When either is totally absent, man is insane". Following Lefevre, land belongs to Africans by natural right as well as by African customary laws.

Thus, while other scholars argue that land and property ownership have been at the heart of the onto-epistemologies of subject formation in the histories of Western, white male, colonising capitalists, property owning and sovereign human subject (Butler *et al*, 2013); other scholars argue for the need to recognise the centrality of violence, coercion, trickery and other extra-legal mechanisms that played a role in colonial control over land and other resources in Africa (Lentz, 2007). In other words, central to colonial property issues in Africa is the violence and dispossession that were occasioned on Africans; also what is central is not [colonial] subject formation but the dispossession of Africans. Besides, a reading of works by scholars like Melvin (2003) and Baxter (2014: 5) shows that the colonists dispossessed, killed and exploited Africans in the name of the Queen and for this reason when they ran out of ammunition to kill Africans they sang “God save the Queen”. In this sense, colonisation was not centrally about being male or female. Colonisation was about imperial assertions of its sovereignty while paradoxically destroying the sovereignty, autonomy and property ownership regimes of Africans. It is this total destruction of these regimes and their replacement with alien ones that is at the root of Africa’s current disablement.

Thus, assertions that notions of ownership only existed in Western epistemologies are in fact founded on colonial discourses including John Locke’s theory which was intended to justify colonial conquest and enslavement of non-Europeans (Miura, 2013). While Locke presupposed that indigenous people had no governments and knew no cultivation, it is noted that indigenous people practised cultivation and had knowledge about a number of industries including weaving, mining, smelting and melting minerals-in fact it is also noted that White colonists in North America and Africa learnt how to grow and preserve some crops from aborigines (Miura, 2013: 6; Nhemachena, 2017).

While a lot of debates have been made with some arguing that Africans did not have notions and practices of ownership and others arguing that the notions and practices of ownerships originated with colonisers (July, 2004; du Plessis, 2011; Obioha, 2013); we argue that there are problems with scholarship that focus entirely on

problematise African notions and practices of ownership. Rather, what is problematic in African is (neo-)colonial claims to ownership and control of African land. Firstly, as hinted above, problematisations, including assumptions that Africans did not have notions and practices of ownership, are founded on Locke's erroneous early colonial presuppositions of *res nullius* and *terra nullius* that were supposed to legitimise colonisation and dispossession of the indigenous people. In other words, debates that begin from the presuppositions that are meant to legitimise dispossession are themselves dispossessing and unjust. They ideologically and epistemically dispossess and usurp Africans of their pre-colonial notions and practices of ownership. These practices were common cause and enduring. Secondly, merely focusing on deconstructive and destructive debates on African notions and practices of ownership is Lockean in origin and foreign to us. Locke's theories assumed that it is only the indigenous people, their lands, practices and institutions that are up for grabs and can thus be contested. In other words, the underlying assumption in deconstructing African notions and practices of ownership is that Africans are in frontier zones in both physical and epistemic senses such that they are questioned and contested more than is ever done to the colonising Westerners. What is worse, Africans are questioned and interrogated [about their ownership and control over their resources] by colonists and their descendants who have robbed and dispossessed the Africans-this is unjust particularly because Africans do not also go to the Euro-American regions to quiz, interrogate and question White people about their ownership and control of their resources. Thirdly, if scholars realise, as they should, that Africans have always owned their resources, then the key question to colonists and their descendants is why they claim/ed ownership of what other people already owned.

Claiming ownership of what other people own means that the claimant is confused and is reckless with when and where to lay claim; in other words, it amounts to lacking proper, adequate and clear parameters of what one owns and does not own. What we are driving at here is that it is not Africans that lacked concepts and practices of ownership but it is (neo-)colonists that are so muddled [and irrational] about what they owned and what they did not own such

that they ended up claiming ownership of African lands and other resources. It is this kind of confusion that still goes on with the new scramble for Africa and the contemporary land grabs which amount to replication of colonial dispossession of Africans. Part of it reflects disrespect, insolence and blatant contempt of Africans who are relegated to animals (in Lockean conceptions).

Debates on Africa have tended to focus on simplistic, fruitless, helpless and unproductive assumptions that there were no notions of individuals but of community and communalism in Africa. The erroneous assumptions are that colonialism brought about individual ownership as opposed to communal ownership. These assumptions ignore the fact that colonists did not colonise Africa as individuals but that they acted as *bands or communes of colonists* working together to colonise and dispossess Africans as evident in the Berlin conference. Secondly the erroneous assumptions in the presupposition that colonialists brought individualism are evident in that the colonists themselves annexed, colonised and dispossessed indigenous people in the name of the Crown or the imperial queen. They did not dispossess indigenous people in order to establish individual ownership but to establish imperial dominions, control and ownership of the colonised territories. Thirdly, the colonist also anchored ownership with the colonial states [which they set up] which represented the collective [rather than individual] interests of the colonists. To clarify matters, while colonists' modalities are often understood in terms of private and public ownership of land; African modalities are contested in terms of individual and communal ownership (July, 2004)-and in this as if the private is not also the individual and as if there is nothing public in the [African] communal modalities. We argue that there is private in the individual logic and there is public in the communal logic. We also argue that the categorisation of colonialists' modalities as public ownership of land is erroneous because colonisation was not necessarily public but involved it involved secrecy, trickery, shady processes, theft and robbery. To sanitise colonists' modalities as the realm of public ownership is to erroneously categorise robbers, thieves, thugs as publicly owning what they have looted. For ownership to be considered in the public realm, it needs to have been acquired

legitimately using publicly approved modalities. On the other hand, colonists' modalities cannot be categorised as private ownership because to categorise them as private ownership would be to ignore or efface the fact that colonists looted, robbed and dispossessed African publics of their land. In other words, (neo-)colonists neither own privately nor publicly in Africa. The point here is that colonists neither brought private [individual] ownership nor public ownership of land-what they brought about was the stealing of land.

It is largely in the consideration of African land as communal and common as distinguished from private and public [more commonly used in references to the West] that the current challenges of land grabs by transnational corporations and their governments can be traced to. Communal and common land resources have in the colonial history been considered to be so open that it is in the commons and communal property that waste could be dumped. The fact that Westerners dump their e-waste and other waste in Africa (Mawere and Nhemachena, 2017) is testimony to the fact that the categorisation of Africa as communal and common is detrimental. If Africans had, as indeed they had, precolonial African states, why is it that African land not allocated to individuals was categorised as communal or common land instead of publicly owned land? If the West that calls its land public is not consequently amenable to the dumping of waste as well as dispossession via land grabbing [which [Africa is currently suffering] then why not discard the terms communal and common that have been used to legitimise colonial dispossession, waste dumping and postcolonial land grabbing? The point here is that Africa did not necessarily and simplistically have communal or common land; Africa had public land owned and controlled by the pre-colonial states, led by the kings and chiefs. The categories communal and common are Lockean in origin and they are designed to portray Africa as open to colonisation and occupation by colonial settlers deemed to have legitimate rights to claim the so called communal and common land of Africa. Further the categories communal and common, as opposed to publicly owned land in precolonial Africa, were designed to efface precolonial African states and also to deny precolonial Africans their identity as publics. Along with their "communal" and "common" property, Africans were

consequently deemed to be “communal” and “common” property for colonists who consequently used the Africans as their common pool of cheap unpaid labour.

The point, from the foregoing, is that with colonialism Africans were denied the status of publics with capacity to exercise public power; African rulers were deemed to be communal leaders rather than public leaders; defining Africans as communal and common had the dual purpose of denying them the distinctiveness as well as denying them spaces in the (neo-)colonial public sphere including politics, public policy making and planning. In other words, the descriptors communal and common erroneously presuppose absence of [stately] public power as well as absence of private rights in precolonial Africa. As argued above, the categories public and private existed in precolonial Africa but these categories differed from colonial public and private spheres in that the colonial ones were superimposed on African ones and because the colonial ones were based on robbery, dispossession and looting Africans. In the same sense, we argue that there was not necessarily absence of individualism [and the corollary individual ownership of resources] in precolonial Africa; colonist did not necessarily introduce individualism but they introduced a particular form of [irresponsible] individualism premised on dispossessing, cheating, tricking, looting and robbing indigenous Africans of their land and other resources. Notable is the fact that African vernacular languages like the Shona have terms like *changu/rangu/wangu* (mine) and *redu/wedu/zvedu* (ours) which express ownership of resources by individuals and collectivities respectively (Nhemachena, 2016; 2017). The only difference with Western individualism is that in Africa there was emphasis on responsible rather than irresponsible individualism, wherein [unconditional] restitution and compensation were *sine qua non* for peace and stability.

Whereas other scholars would privilege the emergence, with colonisation, of real estate market, the common law concepts of ownership, property law and contract (du Plessis, 2011), proper analysis in Africa does not have to begin from the colonial establishments of real property estate markets, common law concepts of ownership, property law or contract law; rather the

beginning point should be with the colonial dispossession of Africans' property. Indeed the institution that is called the [liberal] market which has been privileged by Westerners has facilitated the colonial dispossession, exploitation and depredation of Africans. In fact, and right from the onset of the colonial era, John Locke used liberalism to legitimise colonisation and dispossession of indigenous people. So, the (neo-)liberal market, the colonial fallacy of contractual freedom and consent need not be foregrounded in this decolonial era where Africans, dispossessed and exploited for centuries, are calling for respite. The recent claims by the World Bank and United Nations Food and Agriculture Organisation about having rediscovered the customary law systems as developmental tools (Akuffo, 2011), need to be appraised in terms of the imperatives of restitution and compensation for colonial dispossessions. Restitution and compensation are very much central aspects of customary law, *Ubuntu*, *Chivanhu* and indigenous knowledge systems. So, any genuine considerations of revalorisations of customary laws and indigenous knowledge systems need to foreground restitution and compensation. Any recognitions, of customary laws and indigenous knowledge systems, that do not consider these central principles of restitution and compensation, are in fact facades serving to legitimise (neo-)colonial global governance. Global governance thrives on dispossession and theft which breach customary law and indigenous knowledge systems.

Discourses which presuppose that African indigenous knowledge systems are animistic, as well as that pre-colonial Africa had no states and governments, are in fact meant to prop up on-going recolonisation projects. Similarly, discourses that presuppose that pre-colonial indigenous societies were open, and thus without distinctions of who was an insider and outsider, are in fact meant to prop up contemporary recolonisation and land grabs by foreign transnational corporations and foreign governments. In this vein, the foreign transnational corporations and their governments are setting up their own military and security companies on the African continent which they deemed to be open and unable to distinguish between insider and outsider. The same Western governments and transnational corporations feed Africans with toxic ideologies to the

effect that their states and governments have become moribund and therefore need to be replaced by “new” forms of [Western controlled] security. African states and governments are often demonised as autocratic, authoritarian, weak states, failed states and so on and African leaders are hunted down for prosecution and incarceration at the International Criminal Court that paradoxically specialises only in indicting Africans. In the meantime, the transnational corporations and their governments set up and fortify their military and security bases on the continent whose leaders they selectively send off to the International Criminal Court. The subscription by Africans, the targets, to the ICC is as much a historical, political and shameful aberration as it is suicidal.

Map number 1 below shows the United States of America’s military bases in Africa.



U.S. military outposts, port facilities, and other areas of access in Africa, 2002-2015 (Nick Turse/TomDispatch, 2015) cited in Mint Press News, 11 December 2015 www.mintpressnews.com/211971-2/21197/

Map number 2 below shows French military bases in Africa



Source: Business Insider, 22 January 2015, France's Military is All Over Africa, <http://www.businessinsider.com/frances-military-is-all-over-africa-2015-1>

The presence of foreign military bases on the African continent militates against principles of African sovereignty over land and territories: the sovereignty is central to indigenous people's contemporary efforts towards decoloniality within Africa and beyond (Borras *et al* 2012; 2015; Struve, 2003; Kalt *et al*, 2004 Chang 2011; Nhemachena, 2016). Land sovereignty is defined as the right of people to have effective access to use of, control over land and the benefits of its use and occupation, where land is understood as a resource, territory, and landscape: it is the realisation of the human right to land and therefore demands for land sovereignty are effectively calls for states to get back in (Justice, 11 October 2012; Borras *et al*, 2012). Whereas there are some apologists of

neoliberalism who argue for the banishment of the African states, demands for land sovereignty and food sovereignty entail the necessity of retaining African states and of holding them accountable to citizens amidst renewed corporate and transnational global assaults on the agrarian front in the form of transnational land grabs (Justice, 11 October 2012; Borras *et al*, 2012).

Thus, while foreign military bases are often justified, by Westerners, on the premise of protecting African countries, there is also need to consider matters of sovereignty. It is also necessary to note ways in which Western countries and their institutions covertly and overtly, directly and indirectly create conflicts in Africa which they regard as an experimental ground for Western weapons. Necessary to also consider is the fact that the foreign military and security bases on the African continent serve to protect Western economic interests, gather intelligence, repress movements that call for self-determination, protect puppet leaders against uprisings by their own people and to intimidate African people by presenting an all-powerful image of empire often renamed globalisation (Bangura, 2007). Although sovereignty is crucial in resisting the transnational corporations and foreign governments-led contemporary land grabs (Borras *et al*, 2012), African sovereignty is being trampled upon. It is for instance noted that France has military bases in Senegal, Cote d'Ivoire, Mali, Mauritania, Burkina Faso, Niger, Chad, Central African Republic and Gabon; France still maintains its colonial military bases across the postcolonial African continent: thus, thousands of French troops are spread across the continent to protect French business interests (Bangura, 2007; Business Insider, 22 January 2015; New York Times, 9 February 2007). On the other hand the United States of America also has military bases in Morocco, Botswana, Kenya, Sao Tome and Principe, and it has also taken over Djibouti from the French: USA military also uses a constellation of airstrips and ports in Africa to collect intelligence information and it uses drones on the continent as well (The Economist, 9 April 2016; Bangura, 2007). Thus, the USA is noted to have established its control over 191 governments which are members of the United Nations and USA conquest, occupation and or supervision of these various regions of the world is supported by

an integrated network of military bases and installations which cover the entire planet (Global Research, 7 March 2016).

African and other states in the global south are coerced, including via the organs of the United Nations, to demilitarise and implement security sector reforms. However the USA military is paradoxically allowed to militarise not only its own continent but also the whole world in which America has installed military bases and installations including in space (Global Research, 7 March 2016). So, the USA is patrolling and supervising the whole planet, keeping an eye on countries opposed to USA corporate control over planetary resources. The USA has about 325 000 military personnel in Africa, Asia, South Korea, Japan, Indian Ocean, Philippines, Singapore, Thailand, Australia (Global Research, *ibid*).

So, in spite of the existence of the International Network for the Abolition of Foreign Military Bases (Global Research, 7 March 2016), militarisation of the planet and of space continues even as countries in the global south are coerced to demilitarise. Thus, Dos Santos *et al* (2014: 88) argue that:

The main controversial issue concerning military bases is their establishment in foreign states' territory, a common practice related to global distribution of power in spheres of influence. Usually linked to great powers' foreign policy, military installations abroad have led the international community to many debates associated with the principle of sovereignty...according to this principle of sovereignty no other state can impose its jurisdiction abroad, only inside its territory. In other words, the principle of sovereignty of a state clashes with the implementation of military bases belonging to other countries inside another one's territory.

Conclusion

In the light of the foregoing, we argue that African states as indeed the entire continent is in a state of capture by Western transnational corporations and their home states and governments. These organisations, institutions, states and governments do not only

continue to dictate policies, laws, rules, procedures in matters about African land, economies and politics but they also exempt themselves from the applications of the same rules, law and procedures and they exude the application not only of double standards but double logics. Thus, double logics manifest as follows: while Western states, governments and institutions often make lots of noise about absence of human rights observance in Africa, the same Western states, Western governments and transnational corporations do not observe human rights of African peasants whose land is being grabbed without compensation by these entities. While the Western states and governments would not tolerate the presence of African military bases in the Western countries, paradoxically, the same Western states and governments have military bases across the African continent. Besides, although the Western state and governments always glorify their own political sovereignty and the planetary economic sovereignty of their transnational corporations, they paradoxically expect African states and governments to give away their sovereignty. While the Western states and governments as well as Western backed “civil” society organisations coerce African states and governments to implement demilitarisation, including security sector reforms, the same Western states and governments are paradoxically busy militarising the entire planet including space. Although African states are expected to keep their armies [even on their own continent] locked up in barracks for fear of being accused of militarising everything, Western (neo-)colonial armies are paradoxically deployed onto the continent. Hardly any voices are heard complaining about the foreign militarisation of the African continent. Paradoxically, much of the complaints, via the Western inclined media and other organisations, have been about the sights of African militaries in African villages and in other African public spaces. It is argued that there is need to note that foreign militaries do not become civilians when they operate from the bases in Africa. In this respect their presence constitutes [Western] militarisation of the African continent. . The issue here is that Africa should accord maximum security protection to its resources particularly in the light of the sad history of colonial and enslavement plunder. Which rich man or woman would not accord maximum security to their riches,

particularly when they have a sad history of having been robbed and plundered? In other words, it is not up to those that have robbed and plundered Africa for centuries to return in the 21st century and tell the continent to de-securitise, demilitarise and so on. African land and other resources require strong African security systems to be in place to protect and defend its wealth for itself now and for progeny.

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Security Sector Reforms and Transnational Corporations' Land Grabs: Militarising or Demilitarising Africa's Security Sectors?

Bowden B C Mbanje; Panganai Kabuni & Darlington Mahuku

Introduction

The Security Sector Reform (SSR) is a concept that first emerged in the 1990s in Eastern Europe. It was propagated by the British politician, Clare Short, in the post-cold war era under the guise of a development agenda and the need for democratisation of Security Sector Institutions (SSIs) which would result in enhancing the rule of law in Africa. Clare Short (1998), was the first British Minister for International Development in the newly-created Department for International Development (DFID) by the Labour government that came to power in Britain in 1997. The need for comprehensive reform of the 'security sector' had been identified earlier, but it was the speeches by Short (1998, 1999), and the policy statements by her department that made 'security sector reform' prominent as a term and as a concept (Brzoska, 2003:3, Williams 2000:3, Hendrickson 1999:9-10, Law 2011:2). In spite of the fact that Western states have not cut on their security sectors but have rather increasingly expanded their military forces, the main argument from proponents of security sector reforms in Africa was that this new political and economic dispensation could improve sustainable development, democracy, peace and stability. However, critiques have observed that the SSR concept has been maliciously employed by the West to destroy local governance structures of the security sectors (SS) in order to benefit the Northern countries' political and economic policies. Evidence of the negative repercussions of SSR initiatives in Africa can be witnessed in the DRC, Mozambique and in Nigeria's

current inability to contain rebel or terrorist groups within their territories.

The Euro-American proponents of SSR have hypocritically and increasingly been prescribing how SSR should be done in their former colonies in Africa with the objective of weakening this sector by advancing a neo-colonial agenda. We argue that such neo-colonial agenda is mainly propagated by civil society organizations that are funded by Western countries to advance Western interests in former European colonies in Africa. The call for SSR in Africa is done through CSO and brainwashed neo-liberal academics under the guise of democratizing the SSIs. In fact, the current assaults on African security and military establishments are meant to weaken and increasingly push Africa towards a totalitarian and authoritarian New World Order dispensation with a One World Government controlled by Euro-America, possessing resource monopoly in a de-bordered and flattened planet. Thus, it has been observed that this sheep-in-wolf concept of SSR has been carefully planned to cover up for Western interests. In fact, these advocates of SSR want continued access to the continent's natural resources and in this regard, they consider Africa to be open territory or commons for Westerners who, consequently, do not expect African states to securitise and sovereignise African resources, conveniently deemed commons in the Western parlance. We therefore argue that if the democratization of the military means an enhancement of institutional capacity to respect humanity while at the same time strengthening the need to protect, defend and safeguard national, regional and continental interests and state sovereignty then it can then be regarded as plausible. Yet still it should not be up to (neo-)imperial powers to dictate African security and military establishments, *a fortiori* because Africans do not dictate how the West handles its military and security establishments in their continent and states.

It was after the Cold War in the late 1990s that most European state armies were downsized, military expenditure declined and the role of the military was reduced and defence expenditures were placed under increasing scrutiny for transparency (Sugden, 2003:7). The argument for this paradigm shift from a focus on security to development and democratization issues, was that; the allocation of

military resources to the social sector, namely the areas of health and education would better serve the interests of the people (Lala, 2003:7). The end of the Cold War is widely perceived in the literature as the root of SSR yet states like the United States of America have increasingly been establishing their military bases on the African continent and in outer space, in their ongoing quest for full-spectrum dominance (Rice, 2000; Bush, 2002; Flanagan, 2005; Mcfate, 2008; Chomsky, 2008).

The origins of SSR lay in the growing spurious recognition within the ‘development’ or ‘aid’ community that development and security are interdependent (Bellamy, 2003:101). SSR as a concept “came to be used, first by the authors from the development economics school. They were concerned about the negative effects of the unreformed security sector to the development of the economies in the developing and less developed countries. The implicit assumption of the development paradigms had been that the promotion of social development and economic growth automatically enhanced peace and stability (Yusufi, 2004:2). What is unfortunate in the Western funded “development” and “aid” communities that are advancing such demilitarization and de-securitization is that African development is hampered less by African militarization and securitization of their resources than it is by Western failures to restitute and compensate for dispossessing and enslaving Africans.

Consequently, SSR has assumed importance for some in “civil” society as a concept providing an amalgamation of the previously separated fields of security and development studies (Egnell and Halden ,2009:28). One of the manifestations of this recognition has been the increasing involvement of donor governments but some of these governments are busy establishing their own military bases in Africa, SSR *advocates* or *reformists*, Civil Society Organizations (CSOs) and development practitioners in SSR security, particularly in Africa and other developing countries. There has been increasing recognition by the donor community including the OECD (OECD), the World Bank (WB), the UN and the European Union (EU) that, in the absence of security, key development objectives and structural stability cannot be achieved in some African countries. The reform of the security sector through demilitarization initiatives is now

increasingly seen as a means of promoting sustainable peace and development (Lilly *et al*, 2002:1). But sustainable peace and development as far as Africa is concerned can be effected through restituting and compensating Africans dispossessed, exploited, impoverished and enslaved by those that are now coming to the continent to dictate security and military policies. In this regard, we argue that concerns should not be focused merely on military and what are termed security establishments that are controlled by African states; rather there is also need to realize that Africans need economic security which comes with assertions and realizations of sovereignty over their resources including land and minerals in it. African human security cannot be realized without economic security and the essential African sovereignty over African resources.

Belloncle (2006) notes that “SSR aims to address a double deficit, that of security and democracy. This notwithstanding, we note that the problem is that in the West that is considered to be democratic, there is also heavy securitization and militarization: this suggests that the existence of securitized and militarized establishments does not necessarily negate democracy. The concept is argued to aim to “transform the security institutions so that they play an effective, legitimate and democratically accountable role in providing external and internal security for their citizens” Belloncle (2006:2). However, as the debate unfolds, it will be noted that in Africa, much emphasis has been placed on the democratic (demilitarization) aspect of SSR rather than the capacitation of the SS (militarization).

SSR Demilitarization and Militarization

States, the world over, have an executive branch which consists of either a president or a prime minister. Lunn (2010:17) succinctly gives the functions of the executive branch as follows:

The executive of any nation comprises the democratically elected or appointed leadership, whether president or prime minister, or both, plus the permanent cadre of civil servants and military officers. It is responsible for allocating to defence an appropriate place in the nation’s priorities, for adjudicating between competing claims, and for

ensuring defence requirements are consistent with political goals and economic resources.

The president is normally the commander in chief of the defence forces in whose office is vested the authority to make military-related decisions in accordance with constitutional stipulations. Thus, the executive determines security policy and exercises control over the security services (Nathan, 2007:7). Notwithstanding the executive power over the SS, parliament and CSOs also have a duty to oversee and review the security sector's activities and expenditure including ensuring compliance with the defence mandate while observing the rule of law (Bruneau and Boraz, 2007:14). In line with militarization and demilitarization, the focus of this chapter is mainly on the oversight role of parliament and CSOs in determining defence budgets, arms procurement, the deployment of troops and so on. Oversight is thus, loosely seen as the act of parliament and CSOs in keeping a watchful eye over the government and its institutions validating their performance and usage of resources (Bruneau and Boraz, 2007).

Accordingly, legislative oversight includes activities such as approving or refusing to approve the defence budget, adopting new laws, over-viewing the defence procurement processes and adopting/discussing the security policy of all security services (Born, 2002:4). Put differently, the propensity of the executive to monopolise and autocratically decide the national security and defence policies, and corresponding roles and functions of the armed forces, can be checked with adequate parliamentary and CSOs' oversight (Naidoo 2005:37). The main principle of parliamentary and CSOs oversight is therefore to keep the government accountable and to secure a balance between the security policy and society by aligning the goals, policies and procedures of the military and political leaders (Born *et al*, 2003).

The term demilitarization, is premised on the idea of reducing the size of the armed forces, arms production, weapon imports, and a decrease in the role in which military institutions play in both national and international affairs (Lamb, 2000). SSR *advocates* or *reformists* are calling for a SSR that focuses on the demilitarization of the [African]

SS. Consequently, our emphasis on demilitarization will be on democratic oversight of the SS, where, as highlighted in this section; both parliament and CSOs can oppose defence budgets, the deployment of troops, arms procurement and so on. The SSR *advocates* or *reformists* base their arguments on idealism. Idealism views the individual as the centre of moral values and goodness and emphasizes that human beings should be treated as ends rather than means. It stresses on ethical standards over power struggles; and institutions over military capabilities (e.g. large armies and armaments). The major thrust of idealism vis-à-vis SSR is that the SS should include the introduction of democratic principles such as respect for human rights in the SSIs; a transformation of the SSIs in order to meet human security needs; a professionalization of the army; the introduction of new recruitment and training policies which among other things would increase the number of women within SSIs, and the reduction of the size of the military through disarmament and arms control programmes.

Militarization on the other hand, denotes the adoption of military means such as military power, the procurement of sophisticated equipment, and advanced technology for the achievement of a given goal (Ben Eliezer, 1998; Haggety and Ericson, 1999). Accordingly, in this article, we define ‘militarization’ following Condoleezza Rice’s viewpoint that:

New weapons ... have to be procured in order to give the military the capacity to carry out today’s missions. But even in its current state, the military *should* enjoy a commanding technological lead and therefore has a battlefield advantage over any competitor. Thus, *a president* should refocus the *state’s* priorities on building the military of the 21st century rather than continuing to build on the structure of the Cold War. A *state’s* technological advantages should be leveraged to build forces that are lighter and more lethal, more mobile and agile, and capable of firing accurately from long distances. In order to do this, *a state* must reallocate resources, perhaps in some cases skipping a generation of technology to make leaps rather than incremental improvements in its forces (Rice, 2000:4 emphasis ours).

As a result, our focus on militarization is on the ability of any state to ensure that it has the military capabilities to deter aggression, maintain internal stability, project power, fight in defence of its interests, and assist other states in times of armed insurrection if need be. The SSR *critics* are calling for the militarization of the SS. This view is guided by the thinking of contemporary realist scholars such as Hans Morgenthau (1951) and Kenneth Waltz (1979). Realists note with regret that the international system is still without a world government and there seems little reason to suppose that one will soon or will ever appear in the distant future. Thus, the major argument is that, the world we live in is anarchical and SSR should therefore be seen in terms of preserving state or national security (through militarization). Once state security is preserved then citizens are assured of security.

The SSR *Critics*, just like the realists are quite aware of the inevitability of conflict in the international system. This has made them to call on states to come up with strong security institutions that can help maintain stability in case a state experiences insurrection or rebellion as is happening in Somalia, Nigeria, DRC and Mozambique. The irony of it all is that at one point in time, countries like Nigeria, Ebo (2009); DRC, Ouédraogo (2014) and Mozambique, Lala (2003, 2004) went through various stages of SSR but, these SSR programmes were only meant to help ‘democratize’ or ‘demilitarize’ the security institutions without actually improving on their defensive and offensive capabilities (militarization). A well-equipped, reformed and trained security apparatus can easily contain any situation as exemplified by the American Army which is highly trained and can fight two wars at the same time.

African armies lack that high level of preparedness leading to insecurity and instability within their borders. The insecurity which continues to characterize the lives of thousands of people in Nigeria, Somalia, DRC, South Sudan and Mozambique leads realists and SSR critics to suggest that the key question is to come up with reforms that focus on the capacitation of the military. This means a military with technological knowhow and is well trained, efficient, dependable and highly motivated to carry out its moral obligation of safeguarding the state’s sovereignty and protecting citizens from both

internal and external threats. These arguments will be addressed later in this chapter. Before we dwell on these issues; we first analyse the major debate between SSR reformists and SSR critics.

Situating the SSR Debate between SSR *Advocates/Reformists* and SSR *Critics*

Security Sector Reforms (SSR) remain a topical subject in Sub-Saharan Africa which, in the context of the on-going new scramble for Africa, is currently suffering land grabs by transnational corporations and foreign governments that are being supported by the World Bank, USAID, DFID and other institutions. In this regard, institutions such as the World Bank, USAID, DFID, and UNDP have immensely funded security sector reform programs in Africa as part of building reliable political institutions which are guided by ‘democratic’ principles (Isima, 2010). This chapter is therefore an attempt to identify and debate special considerations that must be given to SSR in sub-Saharan Africa.

Two schools of thought have therefore arisen owing to the differences in the perception of SSR in Africa South of the Sahara. For the first school, which comprises of security sector reformists such as Ebo (2007b), Rupiya, (2008, 2009), Isima (2007), Ngoma (2006), Caparini (2004), Ball and Hendrickson (2009) and Mhanda (2015), Ndlovu-Gatsheni (2002), Nyakudya (2009) the central argument is that the existing status quo within the African security institutions needs extensive change or a complete overhaul. This school believes that the main security threat originates from the state itself such as poor governance of security institutions and an unnecessary militarization of SS. The proponents argue that this leads to a situation where the whole society goes through traumatic disruption arising from security sector brutality.

The other school, which comprises of security sector *critics* such as Doro (2012) and Williams (2002), asserts that the status quo within the African security institutions should be maintained, while enforcing minimal reforms where possible. Their major focus is on both internal and external threats posed by occurrences such as predatory states, terrorist organizations and insurgents and regional

catastrophes and so on. Further to this, threats to African states are arising from the on-going scramble for the continent's resources, the on-going transnational corporations and foreign governments land grabs and the consequent threat of recolonisation of the continent (Southall *et al*, 2009; Hardt and Negri, 2000; Passavant and Dean, 2004).

The two schools of thought have led to irreconcilable differences as they impact the norms, rules, values, and procedures that should be deployed to guide the administration and functions of the SS.

The *reformists/advocates* see SSR as a 'magic bullet' for Africa's political, social and economic transition to stability; yet paradoxically lessons from Euro-American states indicate that their own stability and prosperity are enhanced by militarization, including their militarization on a world scale. The argument by the reformists is that SSR is paramount to bringing about stability in any political system. Such an argument emanates from an assumption that African security institutions have been at the helm of political, social and economic crises and there is thus an urgent need to depoliticize, re-professionalize the security sector and to demilitarize these institutions from political and economic interferences. In that regard, the *reformists* have also made several calls ranging from a complete overhaul of security institutions by retiring the old guard, formulating new national and defence policies, improving on parliamentary and civil society oversight roles of security institutions, inclusion of women in top security sector posts, redefining human security as well as a democratization of the whole gamut of the security sector institutions. This, they argue, will set a good pace for the development of African countries.

The first school of thought is backed by the works of various African and European reformist scholars/academics like Chitiyo (2008,2009), Rupiya (2008,2009), Hendricks and Musavengana (2010), Isima (2010), Ngoma (2006), Ebo (2007), Caparini (2004), Ball and Kayode (2006), Mhanda (2015), Mwange (2009), Modise (2007), Ngculu (2003), Africa (2011) and so on. Indeed, all have concurred that SSR is a precondition for effective political reform and the democratization process yet in the West no such inconsistencies are seen between militarization and democratization

of the states. Generally, they are also agreed that in most African countries there is a security sector governance deficit which calls for radical reforms of the whole security sector edifice. Therefore the sad underlying assumption in this school is that Africans are savages or barbarians who cannot be trusted with weapons: the assumption is a replication of the centuries old colonial denigration of Africans. Thus, no mention is made about the need for capacitation of the African SS.

The second school of thought has other ideas. Critics of security reforms such as Williams (2000), Chuter (2000, 2006), Doro (2012), Negonga (2003), Mehler (2009), and Smith (2001) question the reformists' approach to SSR. They argue that the concept of SSR tends to be biased in favour of Western democratic principles which are at times incompatible with the norms, values, ideologies, and beliefs of African security institutions.

To be noted is the fact that *reformists* have, among other SSR demands, called for the recruitment and promotion of more women within the SS and they have also requested for democratic oversight of the security sector. Critics' argue that *reformists'* obsession with democratic oversight is mainly to see that the legislators cut on defence budgets and also that civil society groups – especially the media reveal 'juicy' stories within the military institutions (e.g. some information which should never be exposed to the public domain as it falls under state secrecy). Critics of *reformists*, present the bold argument that the world over the military is an institution where males are dominant (Gill, 1997) and that young men are more likely to volunteer for military training than young women (Armor, 2013). SSR *critics* such as Mehler (2009) and Williams (2000) strongly argue that if any woman is to be promoted within the military ranks she should first demonstrate high skills and competencies as well as exceptional leadership qualities.

According to SSR *critics*, the security sector needs to be capacitated through various technological advances in warfare; this in fact is what is happening in the global north. Calls being made by some advocates of SSR to retire some colonels and generals within the security sectors of Sub-Saharan Africa are seen by most critics as being rather mischievous and misplaced. Sun Tzu cited in Krause and

Williams (1997), the great Chinese strategist, once remarked that a state is as strong as its generals. Von Clausewitz cited in Vasquez (1983) also asserted that generalship is more about experience, than bookish knowledge. In this regard, SSR *critics* view with suspicion and scepticism SSR that calls for the retirement of army generals. Such a move would not only weaken the military establishment but would also make the whole state apparatus vulnerable to predatory states, thus also weakening and threatening state sovereignty. These will be discussed further in the coming sections. Below, we look at two case studies on militarization with special focus on a superpower and great power.

Militarization of the SS: Putting the USA and Russia into Perspective

The President of the United States (US) is the head of state and government. He has the ethical duty to lead the executive branch of the federal government and is the commander-in-chief of the United States Armed Forces. Article II of the US Constitution gives the President power over a variety of state issues. The President is vested with the executive power of the government; he is named Commander in Chief of the Armed Forces and navy and he has the moral duty to “take Care that the Laws be faithfully executed.” From these powers is derived the President’s constitutional authority to conduct the foreign relations of the United States such as entering into treaties and receiving ambassadors (Rogers, 1971:1195).

According to Ostrom and Job (1986:541), as the leader of one of the world’s super power, the “President of the US is charged with an ethical responsibility of guiding and implementing policies to protect and advance US interests abroad by putting in place a strong security sector.” One can argue that the protection of US interests abroad forms the basis of the stature of USA’s SS where the executive implements SSR that seeks to capacitate the armed forces to maximize internal and external security, maintain sovereignty and dominate the world. In fact, the USA has a string of military bases on the African continent (Nick Turse, 2012, 2015; Mcfate, 2008;

Chomsky, 2009) and it has set up its military command centres across the world.

A critical observation of the above situation or circumstances under which the US President determines the use of the military indicates that the President has an ethical mandate to carry out SSR that seeks to technologically capacitate or militarize the military as well as to defend the sovereignty of the US. While such a proposition may be critiqued, one must note that great powers are competing for dominance on the world stage and so the US needs a preponderant SS in order to achieve the above objectives. It also needs a strong military in order to remain sovereign, stable and socially and economically viable. The Doctrine for the Armed Forces of the United States (2013:10) clearly states that securing the US homeland is the Nation's first priority. The US homeland has been packaged as prone to attack by hostile states such as North Korea, Iran, Russia, and China, including groups and individuals such as ISIS, Al-Qaeda.

The nation of America must be vigilant and guard against a multiplicity of perceived threats. The defence of the homeland (national security) is the American Department of Defence's (DOD) highest priority with the goal to identify and defeat threats as far away from the homeland as possible (e.g. elimination of Bin Laden in Pakistan; and the 2002 Iraqi military invasion to depose the Saddam Hussein regime which was accused of harbouring intentions to attack the USA using weapons of mass destruction). Deterring its adversaries is the USA's major goal. Winning any war has remained the major reason why the USA maintains a capable and credible military force in the event that deterrence fails (Doctrine for the Armed Forces of the United States, 2013). In defending national interests, it requires that the US be able to prevail in conflict through taking preventive measures to deter potential adversaries (presumably Russia, China and North Korea) who could threaten the vital interests of the USA or its partners.

The Russian Federation

The Russian Federation has 'legitimate' fears of losing its geopolitical relevance in the region as well as risking its hold on

diplomatic clout in global politics. In consequence, the Russian President has taken all necessary steps to facilitate unassailable control of SSIs. Various criticisms have been levelled against the Russian executive over its excessive control of SSIs. However, the posture that the Russian sovereign has towards security of its internal and external interests is thus clearly not out of order. It is in response to this tricky global environment, especially after the Cold War, that the Russian Duma (parliament) has been seized with carrying out SSR that capacitates the SSIs in the event that war breaks out between the Russian Bear and some hostile countries, especially the USA as seen above.

Nichol (2011:2) notes that Russia's national security strategy, military doctrine, and some aspects of the military reforms reflect assessments by some Russian policymakers that the United States and NATO remain concerns, if not threats, to Russia's security and sovereignty. Real or perceived security threats to a country's sovereignty do play a role in structuring the behaviour and decision making of democratic oversight. In such cases, as mentioned elsewhere, parliamentarians have an ethical duty to endorse these sovereign decisions.

Arbatov (2000:vi) points out that, "after an unprecedented decade of disarmament, de-targeting of nuclear missiles, cooperation, and transparency in defence and security matters between Russia and the United States, Kosovo revived the worst instincts and stereotypes of the Cold War." It can be noted that due to the perceived fear of a NATO attack, this has compelled the Russian sovereign to institute SSR that capacitates the SS. Anatolii Serdyukov quoted in Arbatov (2000:4) asserts that, "the reforms were aimed at switching to a performance-capable, mobile, and maximally armed military ready to participate in at least three regional and local conflicts". This in a way has everything to do with Russia's ethical right to project its power, and maintain a strong military within its borders in the event of any future attacks and to safeguard its sovereignty.

Russia's civilian leadership's mantra of military reform is to modernize, downsize, end conscription, and increase servicemen salaries (Bartles, 2011:55). This is in line with arguments raised by

realist scholars that in times of peace a sovereign should always prepare for war. With regard to military reforms, Putin on several occasions mentioned that “the Russian military should become more compact, more professional, and more modern” (*ibid.* 56). Putin “wants to move the Russian military closer to the kind of system found in the West, but he knows that in the end it will continue to have its Russian idiosyncrasies” (Herspring, 2005:138). The Russian Federation’s main goal is to keep up with modern challenges through the optimization and control of the defence forces. The new Security Concept and Military Doctrine are notably very much in line with the current practice of Russian foreign and defence policies and programs (Arbatov, 2000). Russia is quite aware that NATO has enlarged its military power and moved much closer to Russian borders by accepting new member states. As highlighted above, security reforms in Russia have concentrated on modernization and capacitation of the security institutions as to enable them to meet future security threats and to safeguard state sovereignty.

Overall, it has been observed that great power competition for world dominance has seen powerful nations such as, the USA, and the Russian Federation establish military industrial complexes (through the blessings of Congress and the Duma) for the development of advanced military armaments. The creation of these industries has also become a major source of mega income through the sale of arms. Military industries have also become a source of employment creation, where millions of citizens enjoy gainful employment. The American Congress and the Russian State Duma are more interested in the modernization and the capacitation of their security sector as evidenced in the defence budgets which range from 640 billion dollars for USA and 87.8 billion dollars for Russia (SIPRI, 2013). Due to a need to dominate each other in the international system, sovereign states boost their armaments and in doing so other states follow, thus precipitating an arms race and creating an international security crisis.

A strict democratic oversight in keeping with the spirit of parliament would undoubtedly endanger the effectiveness and efficiency of the defence forces which need high budgets to give them the capacity to carry out today’s missions as well as to defend

state sovereignty. However, donors, SSR reformists, and CSOs are more interested in demilitarisation than the militarisation of African SSs.

Pitfalls of the Demilitarisation of the African SS

The above discussion offered the opportunity to observe that the great powers are busy militarising rather than demilitarising. The arms race is going on unabated. In the case of Africa, the pressure is on focusing more on developmental issues (human security) and the security of transnational corporations that have established their own private security and militaries in Africa rather than state security. There has been emphasis on the need to reduce poverty and avoid conflicts that are bedevilling sub-Saharan Africa yet poverty is kept at bay by securing Africa's resources-it is not necessarily by de-securitising Africa that poverty is resolved. However, despite the involvement of donor communities and developed Western countries in funding and managing SSR and development projects, conflict is still prevalent in sub-Saharan Africa. In fact, there are not necessarily inconsistencies between militarisation and development since in the global north countries to militarize even as they develop. One can therefore argue that there are nefarious and hidden aims in the manner in which SSR processes are being structured and funded by donors and the West. It can further be argued that as long as the local content of the host nation is not included in the SSR process the exercise is bound to fail.

The moral considerations that spice the need for SSR to take on board human security concerns as in reducing poverty and increasing development are highly plausible. But it is necessary to note that African state security and the security of Africans are not necessarily inconsistent as argued by proponents of SSR. In this regard, if the security of African states is weakened then logically also the security of Africans is threatened. The devil in the detail surfaces when weaker nations are coerced into undertaking reforms in accordance with the dictates of the Western purse holder and CSOs. Below we discern two areas of concern vis-à-vis the pitfalls of the demilitarization of the African SS. Our focus will be on two sub

themes namely: Western influence and the SSR debate in Africa and an analysis of State Sovereignty in the Context of a Militarized or Demilitarized African SS.

Western Influence and the SSR debate in Africa

In this article, it was noted that the end of the Cold War brought with it calls for reforming the security sector institutions. As such, civil society groups and parliaments were also to act as watchdogs of security institutions by taking an oversight role and also spearheading the ownership of SSR.

Ownership of SSR initiatives has thus remained problematic.

The whole discourse on SSR in sub-Saharan Africa and even most of the arguments raised by African SSR *reformists* concentrates much on Western views on the ownership of SSR. Most of the security institutions in Africa and their ideologies have been imported from the West rather than emerging from Africa's own dynamics and processes, such as liberation struggle experiences and African political cultures. The international community, NGOs and a plethora of African civil society groups have been calling for 'democratization' of the security sector as part of the peace building process. However, there has not been an integrated African approach on how best to deal with issues concerning the security sector. It raises concern that where the SSR is taking place in Africa, one finds that the whole programme is sponsored by the [former] colonial powers under the pretext of bringing about military professionalism. The erroneous assumptions of this is that African states and their militaries are barbaric while (neo-)colonial powers and their armies are erroneously deemed to be [more] professional, even in protecting the Africans that the colonial powers have savaged for centuries during colonialism.

It also becomes apparent that any donor driven process is usually associated with some conditionality that tends to undermine the sovereignty of the state where such reforms are instituted.

Bendix and Stanley (2008:30) observe that:

Donor bias is evident in the exclusive focus of the SSR debate on the reform needs of countries in the global south, while major deficits in the advanced industrialized countries, including a general lack of transparency, arms exports, and discriminatory policies with regard to immigrants, remain outside of the SSR dialogue.

It can therefore be argued that “imposing an externally generated blueprint for security institutions avoids domestic security sector planning processes which in themselves are a fundamental part of any country’s national security and sovereignty” (Williams, 2000:8). It can also be contended that if the security sector improvements are not driven from within the local context then they are more likely to remain superficial and will not tackle the underlying problems of the security institutions (Ebo, 2007c) in Africa and the SADC region in particular.

Calls by Western countries for reforms of SSIs in Africa can also be viewed as illegal under international law. It therefore becomes questionable whether Western states have a right to call on another state to reform its security sector apparatus using their SSR models. The United Nations General Assembly’s (UNGA) 1970 Declaration on Principles of International Law Concerning Friendly Relations states that no state or a collective of states have the sole obligation to intervene, directly or indirectly, in the internal or external affairs of any other state.

Following the above UNGA 1970 Declaration, it can be argued that any SSR that is externally driven becomes unethical because it is a violation of international law. This argument is particularly significant because it resonates with the views of the African Union and how SSR should be carried out on the continent. The AU prohibits all national, regional, continental or international entities from carrying out activities in Africa, in the name of SSR, which may undermine the sovereignty, territorial integrity, political independence, domestic jurisdiction of a Member State, including the use of SSR to effect regime change in a Member State, or its ability to fulfil its international obligations (AU Policy Framework on SSR, 2011:2).

In addition, The Africa Forum on Security Sector Reform held in Addis Ababa from the 24th to the 26th of November, 2014 highlighted the importance of political leadership (sovereign) in the SSR processes. It was noted that political leadership was to be included in all SSR stages consisting of the conception, resource mobilization, implementation, and coordination of national SSR processes, taking into account the fact that SSR can have far reaching political implications on nation-state sovereignty. This means that Western states and other actors have no authority whatsoever to dictate SSR to sovereign African states.

The literature on security sector institutions which includes the works of Doro (2002), Bendix and Stanley (2008), Nathan (2007), Smith (2001), Williams (2000) have shown that in order to avoid undermining a state's sovereignty it is imperative to consider a local approach when dealing with SSR. A new methodology is required that looks at SSR from divergent viewpoints. It could be argued that any theoretical revision can only be effected on the basis of an interdisciplinary approach that incorporates both African and Western intellectual traditions. This means that priority should be given to local views, opinions and interpretations on how best reforms within the SS should be carried out. What is needed is a local model grounded on local African experiences, traditions, institutions and heritages.

Analysing African State Sovereignty in the Context of a 'Militarized' or 'Demilitarized' SS

SSR *Reformists* such as Ndlovu- Gatsheni (2002), Rupiya (2008, 2009), Chitiyo (2009), Nyakudya (2009) and Mhanda (2015) have raised genuine concerns on the coercive apparatus of African states. But there is need to note that all states, whether African or not, are by definition [sometimes] coercive and the ability to coerce is a correlative of the assertion of sovereignty. They note that some African states have inherited as well as preserved a mentality where security structures and the very methods of defence system management, are similar to those of former colonial governments. The key issue though should be about how African states can avoid

colonial defence system management when the colonial economic establishments are allowed to persist? If colonial defence management systems are problematized and deemed to be out of date then also colonial economic establishments need to go. The problem here is that those that criticize African security and military establishments want to eat their cakes and have them: they want colonial military and security establishments to go yet they want colonial economic establishments including contemporary land grabbing by transnational corporations and foreign government to stay. They contend that the brutal force used by members of the security forces on citizens can be described as illegal and unethical since it is in violation of provisions made by the constitution but in all this they forget that rights are not absolute anywhere in the world and that the constitutions worldwide have got savings. They thus raise the issue that security sector institutions in some African states can be a nightmare or albatross on the very citizens they are supposed to protect.

Disturbing cases exist where African governments have not carried out security duties responsibly and ethically.

The following case studies are pertinent: the insurrection of RENAMO in Tete, Sofala and Zambezia provinces raised serious allegations against the FRELIMO army that they were beating and at times shooting civilians they suspected of supporting or collaborating with the rebel group (Frey, 3 May, 2016). During the Libyan conflict Gadhafi unleashed his military on civilians who were challenging his rule; in the DRC people living in some rebel controlled areas were at times raped or brutalized by the military (Harsch, 2009; Ouédraogo, 2014). And in Nigeria those suspected of aiding or living in areas mainly controlled by Boko Haram were brutalized by the Federal state army instead of being given sanctuary (Solomon 2012, 2015; Ouédraogo, 2014).

Given the foregoing examples of irresponsible and unethical behaviour, it can be argued that the call by ‘reformists’ that requires the state to carry out SSR that can best help address victimization of the citizenry is plausible and justified. However, because even Western militaries and security personnel harass, sodomise, rape and kill civilians, security sector reforms need not be solely an African

affair: there is also need for security sector reforms in Western states where, for instance, Blacks are targeted for arrest, imprisonment, lynching and where captives are tortured for instance by the USA army. It can be further argued that rogue behaviour by the state undermines its claim to legitimacy.

At times, as noted by Doro (2012), SSR debates are merely cosmetic political bargains between those in the ruling party and the main opposition parties as well as civil society groups to jostle for political ground without giving any consideration to long term plans or policy initiatives that can bring about genuine SSR. By genuine and enduring reforms Doro (2012) is implying that reforms should make the security institutions more transparent, efficient, and effective and above all be in a position to defend and protect the state and its citizens from both internal and external threats. He adds that after 9/11, the USA and other western governments had to come up with wide ranging reforms within the security institutions as a way of countering the emergent threat of terrorism.

Doro believes that reforms are not about upsetting the status quo or weakening the security sector institutions but they are for making improvements on defensive and offensive capabilities of the SS. He argues that “security reform therefore is not necessarily an exercise meant at wholesale dismantling of the existing structures and supplanting them with totally new institutions” (Doro, 2012:10). It can be argued that this terrible mistake is committed by most *reformists*.

Intriguingly, it is noted that some ‘reformed’ militaries have nearly totally collapsed in the face of attacks by rebels, insurgents and terrorist groups as exemplified by ISI in Iraq, Boko Haram in Nigeria, M23 in the DRC and Renamo in Mozambique. It can be argued that the obsession by external donors of SSR to enhance human security without equal zeal to safeguard national interest and state sovereignty will inevitably weaken state security and open the doors to anarchy and derailment of economic activities. In fact, as underscored by the contemporary transnational corporations and foreign government land grabs in Africa, the Western institutions, states and corporations would benefit from weakened African security and military establishments.

We also observe that, there appears to be selective criticism and characterizations of some security sectors in the African region. It is paradoxical that some SSIs, in the exercise of regional mandates to defend the sovereignty of regional allies in crisis are seen as unprofessional and partisan, whilst, those that lack combat efficiency are viewed as professional. It can be argued that such skewed SSR as advanced by some donor states and *reformists* is a deliberate strategy that seeks to weaken the forces in the region, thus placing their national interests and sovereignty at risk.

It is interesting to note that reformist scholars, cited in this chapter, have not criticized the violation of the sovereign right of the DRC by Uganda, Rwanda and Burundi.

We thus venture to argue that the security sector debate appears geared at alienating the African security forces from governance or political issues. The foreign sponsors of SSR tend to criticize a strong relationship that exists between the security forces and the executives, totally ignoring the need to improve combat efficiency, as exemplified by the poor performance of the Nigerian, Mozambican and Democratic Republic of Congo security forces in dealing with armed gangs in their countries.

The DRC's SS failed to contain the March 23 2017 rebel group, and this raised concerns as to its preparedness to repel a stronger rebel group or a military invasion from another African country. It should be noted that the DRC has not been able to deter military threats coming from a small country like Rwanda. It can therefore be argued that the rebel menace, foreign invasions and other problems the DRC is facing would not have arisen if the country had sufficient deterrent military capability or had militarized.

The ability to speedily eject invaders or easily contain rebel groups should inform the basis for sound SSR. Countries that sponsor their own SSRs such as China, Russia or the United States of America can easily counter any form of aggression against them. Mbanje and Mahuku (2012) point out that the 2011 NATO attack on Libya was a lesson for weakened states to see the importance of military preponderance including the acquisition of weapons of mass destruction if need be.

In contrast, the DRC, a country vast in size has totally failed to contain security threats to its territory and sovereignty. A security sector that lacks combat readiness is weakened and this might end up reinforcing rebel groups and other extremists in and outside its territory, in which case one cannot eliminate the possibility of Hobbesian anarchy, civil strife or foreign invasion.

We therefore argue that the African region needs a well-equipped and politically conscious security sector which can deter any threat to its territorial integrity and sovereignty. African countries should be able to address security challenges within their own territory as well as in the region. An earnest programme of militarizing Africa's SS is needed.

Conclusion

It can be said that the arguments for SSR being propagated by '*reformists*' are not entirely honest since the depoliticisation, re-professionalization and demilitarization of the security institutions is strongly influenced by Western political and ideological thought. In this regard, to argue that African security and military establishments are colonial or Western and therefore should be dismantled is null because even the calls for demilitarization and dismantling of African institutions are also coming from the West and extended via Western inclined academics and organizations. In the end, as happened in Iraq this might weaken a state's military capabilities as the military was easily overrun by insurgents something the insurgents would not have done under Saddam Hussein since he had a more capable security sector than the current American and British 'reformed' SS.

The chapter observed that states are sovereign entities and in terms of security, every sovereign state has some basic responsibilities and duties that include the ability to protect and defend its territory, air space, sea frontiers, and critical national infrastructure. In addition, a state is only secure by ensuring that its national interests are properly protected. The state is also obligated to guard its borders and safeguard its citizens against any danger or harm. The debate calling for SSR in the African region seeks to advance military reforms, some of which might actually compromise

the sovereignty of the states in the region. The reformist agenda has potential to create instability than enhance peace and security in the most peaceful and stable region

We therefore, conclusively argue that, current *reformist* measures to deal with the SS are not appropriate, and are in fact irrelevant, for purposes of bringing stability to sub-Sahara Africa, and that the solution lies with African countries devising their own reforms backed by a militarization of the SS. Only then, will reforms work in the interests of both human security and state security.

SSR advocates would rather cut defence budgets by almost three-quarters since they believe that the money can be better used for development purposes. A simple fact *reformists* fail to grasp is that the security of the state (through a robust defence policy/budget) also safeguards the security of individuals living within its territorial jurisdiction from both internal and external aggression. It is to be noted that both individual and international security are dependent upon national security. SSR in Africa mainly focuses on cutting defence budgets and retiring security personnel than reorganizing security force structures to counter identified threats and increasing defence budgets, thereby enhancing the relevance, operational capacity, and prestige of Africa's militaries.

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Land Reclamation and Restitution: The Role of the Zimbabwean Military in the 21st Century Decolonisation of Land

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Introduction

Radical land invasions are not new to Africa as African pre-colonial states were subjected to such invasions by colonial and imperial states that were not only more powerful but morally, ethically and legally bankrupt. After the scramble for Africa that took place during the 19th and 20th centuries, the colonial military and police forces assumed a very important position in the looting of African lands. As well, in postcolonial Zimbabwe land reclamations assumed not only the form of armed liberation struggles but during the recent Zimbabwean experiences, land reclamations in the Third Chimurenga also drew in the security establishment in the country. The Third Chimurenga also known as *jambanja* (violent struggle) was a new phase in land reclamation. Sachikonye connotes that,

It marked a change in the tone of President Mugabe's pronouncements on Black and White relations.... the concepts of sanctity of private property and 'rule of law' were spurned and drastically revised....land rights, property rights, compensation and what was termed 'an agrarian revolution' was orchestrated to provide justification for the land occupations. (Sachikonye, 2004: 9-10).

Surprisingly post-independence conflicts resulting from radical land restitution by landless peasants, the military and quasi-military forces in Zimbabwe are regarded by amnesiac Western oriented institutions and organisations as new and "barbaric" upsurges. The military in Zimbabwe has played and continues to play a crucial role

for mobilisation during the Zimbabwean Fast Track Land Restitution exercise that took place from the year 2000. Helliker (2006: 127-30) notes that land reform involves three components, that is, land redistribution, land restitution and land tenure. However land tenure gives access to land and deals with the social organisation of production and under market led reform it may be done at the expense of redistribution. Agrarian reform relate to capitalist penetration in rural areas whilst land restitution is all about redressing land inequalities that were a result of colonialism and firmly fixed in colonial history. Land has to be given back to Blacks who were victims of land looting by the Whites and goes beyond mere land redistribution.

The ‘Fast Track Land Restitution’ (FTLR) exercise built solidarities between politicians, the military and the citizens of Zimbabwe. With regard to the land reform, the Zimbabwean military came out of their barracks and are very much involved in the “land restitution politics” and have threatened to go back to the bush if politicians want to reverse the FTLR exercise. It is therefore not surprising that land expropriations in Zimbabwe have been militarised to this day. It has been a long held belief among ‘traditional military scholars’ that the military rarely entangle itself in politics because its duty is to defend the country against external threats as well as protecting its nationals. However, in a context where via global mass and social media, the West has infiltrated African minds, the problem is that the locals have been *zombified* by global media tend to think inside out (Nhemachena, 2016) and in this way often oppose [on the basis of global afflictions] noble national projects.

This Chapter investigates why the Zimbabwe military has involved itself in the political matrix of ruling especially with respect to recent land reclamations and restitution. The Zimbabwean military elite and the Zimbabwe African National Union –Patriotic Front (ZANU-PF) politicians have reignited narratives and memories of the First and Second Chimurenga (Wars of liberation). So the Zimbabwean military institution has vowed to defend land repossession and restitution at all costs. The Question is has the Zimbabwean military entered into a marriage of convenience with

the political elites where they want to defend their acquisitions (new farms) and the benefits that come with them? Why has the Zimbabwean military supported land restitution rather than leave such a political issue in the hands of politicians? How has the ZANU-PF politicians used the armed struggle versus the colonial and neo-colonialism argument that resonate with the military to buttress ZANU-PF government survival. The Chapter also examines whether the land restitution and distribution exercise should be demilitarised. Below we briefly explain why the land question in Zimbabwe has always been a military issue.

Africans and their Land

It must be pointed out from the outset that the reason why Zimbabwe African National Union under Reverend Ndabaningi Sithole and Zimbabwe African People's Union under Joshua Nkomo decided to take up arms was because of colonial dispossession of Africans. This is why Robert Mugabe vowed that "The justice of our cause is the justice of our gun. Our fight is just because our cause is just. And because our cause is just, our fight is just" (Mutambara 2014: 81). One very important aspect with regard to land issues in Africa is that it is firmly embedded in an inseparable link and relationship between a state's military and its people and the relationship has been like that even before colonialism. It is therefore not a misnomer that civil-military relations, in former settler states that fought liberation wars depict that some of these militaries have a symbiotic relationship and understanding with regard to land ownership that they have become 'conjoint twins that have a single heart' with politicians in their respective countries.

Military intervention in politics during these wars of liberation especially in Zimbabwe resulted in the formation of dynamic interdependent 'strategic interactions' that some international relations and military theorists have become very sceptical of. These interactions cannot be wished away because they resulted in the successful execution of the war. This is in conformity with Amílcar Cabral's argument that:

National liberation is the phenomenon in which a socio-economic whole rejects the denial of its historical process. In other words, the national liberation of a people is the regaining of the historical personality of that people. It is the return to history through the destruction of the imperialist domination to which they were subjected (Cabral 1966: 130).

As such the decolonisation process would never have been complete without land being given back to the majority black Zimbabweans. Cabral wittingly argued that “national liberation exists when, and only when, the national productive forces have been completely freed from all and any kind of foreign domination” (Cabral 1966: 130). Zimbabweans thus have an unalienable right to their land, a right that can only be complete through land ownership. Though it has been a long held belief among ‘traditional military scholars’ that the military rarely entangle themselves in politics; the land issue could not be permanently solved if the military, which had taken up arms to fight for the land remained passive spectators. This is why from the beginning of the 21st century, Zimbabwe was gripped by an eco-political crisis that has resulted in the military being very visible in the domestic political arena.

The land problem in Zimbabwe was a creation of the colonial era. As has already been pointed out in the introduction it was because of forceful evictions from their traditional lands that both the Ndebele and Shona rose against the white settlers. Great military men like Lobengula in 1893, Mapondera, Chingaira and others in 1896-7 died resisting colonialism. Paramount Chiefs like Mangwende, Kunzvi Nyandoro, Svosve just to mention a few also later surrendered in 1897 (Ranger, 1967: 295) Spirit mediums Kaguvi, surrendered in the Lomagundi area while Mbuya neHanda was captured in the Mazoe District (Ranger 1967: 308). Both Kaguvi and NeHanda were charged with murder and sentenced to death. It is alleged that Mbuya neHanda said that “her bones would rise” and this was later fulfilled when Zimbabwean men and women took up arms to fight against their erstwhile colonisers.

One of the major grievances that drove these young men and women to join the liberation struggle and the reason why it was

supported by peasants was because of land. The fundamental importance of land in Africa was well articulated by one of Africa's nationalists, Jomo Kenyatta in his book *Facing Mount Kenya*. Kenyatta clearly stated that land is a very important factor in the social, political, religious and economic life of Africans. As agriculturalists, it gives them the material needs fulfilling their spiritual and mental needs. Land, thus, is analogous to a mother who feeds a child through lifetime. Even after a person has died it is again the soil that nurses the spirit of the dead to eternity (Kenyatta 1938: 21). To be African, thus, means to have land. Prior to colonisation every family was entitled to land ownership that was passed down from generation to generation. It did not matter whether one was a hunter, blacksmiths, or a traditional healer they had land to build their homesteads, land for agricultural practices and common grazing areas where their animals grazed. Prime land ownership was thus an unalienable right that every family was entitled to. Men would die defending their land, animals and families during invasions by other kings and chiefs and at times would go to the extent of forming military alliances to defend their territories. In the same manner both the Ndebele and the Shona warriors shed their blood in defence of their land during the first Chimurenga. The Europeans had used trickery, divide and rule and more superior weapons to subjugate the Africans and took control of African lands through military might and conquest. It is therefore not surprising that land ownership became the cornerstone of the colonial government's development policy. Cecil John Rhodes' British South Africa Company and members of the "Pioneer" Column became, by fiat and theft, the new "owners" of the land between the Zambezi and Limpopo rivers by "right of conquest." Africans were forced into reserves; areas that had sandy soils and very poor rainfall patterns. The BSA Company and the subsequent governments that were later established enacted land laws that dispossessed indigenous people of their land.

Herbert Chitepo the former ZANU-PF chairman clearly stated that the Whites erroneously thought that land was not of any value to the Africans. The terms "native" or "tribesmen," were seen as nothing. In the words of Arnold Tonybee the "natives are viewed as flora and fauna and not as men....we feel to treat them as though they

did not possess human rights...they are like the forest trees which the western pioneer fells...the lords of creation in their own good time they come and take possession which by right of eminent domain is indefensibly their own (Chitepo 1970: 10-15). This succinctly captures how Africans were regarded. It was also in his context that Blacks were forced out of their traditional lands whilst laws were enacted to entrench such oppressive practices. In his presentation in Australia Chitepo said:

I could go into the whole theories of discrimination in legislation, in residency, in economic opportunities, in education. I could go into that, but I will restrict myself to the question of land because I think this is very basic. To us the essence of exploitation, the essence of white domination is domination over land. That is the real issue (Chitepo 1970: 10-15).

The Military, Land and Politics in Zimbabwe

Josiah Tongogara learnt one valuable lesson from his Chinese instructors and that was how they had to win the support of the peasants. The land issue was the crux of the struggle that the blacks had against the imperialists. For this to be achieved the revolutionary gun had to be anchored in politics. The political commissars took the guerrillas and the peasants on political orientations putting a lot of emphasis on grievances against the settler regime. Politics was therefore the soul without which the armed struggle would have been successful (Mutambara 2014: 80-86). Mutambara argues that:

When they saw the lethargy in the implementation of agrarian reforms that would lead to fairer land redistribution, they once again rose to the occasion and gave impetus towards its historic fulfilment. (Mutambara 2014: 95).

The Zimbabwe National Army (ZNA) is playing an increased role in the political decision-making process in support of the party-state especially from 2000 to date; it is the 'life-blood' of the ZANU-PF party and has become very noticeable through utterances that are

made by the military elites (MEs). Unlike its southern African neighbours, Zimbabwean politics has become a “straight jacket that only fits those with nationalist or military background” (Ndlovu-Gatsheni 2006: 52). Put differently, the military parochially supports the ascendancy into the office of the president, someone who participated in the Zimbabwe war of liberation against the Rhodesia Ian Smith’s racist regime. The military in Zimbabwe has remained resolute to defend the ideals of the liberation struggle. Their intervention in Zimbabwean politics is therefore not surprising especially if they are of the opinion that Zimbabwe’s sovereignty is under threat be it internally or externally. This is why the military in Zimbabwe are still operating just like what they used to do during the liberation struggle, upholding the views advanced by President Mugabe and ZANU in the late 1970s when he said,

Our votes must go together with our guns. After all, any vote we shall have shall have been the product of the gun. The gun which produces the vote should remain its guarantor. The people’s votes and the people’s guns are always inseparable twins.

By saying this, Mugabe was intimating that any political decision that would be conducted in Zimbabwe had to be made in defence of the country’s interests. Tongogara had a lot of influence on the decisions made by the politicians if not that they always pandered to his wishes or dictates. Paradoxically before the demise of Tongogara, the military were the ones who were controlling the party. Notably, “the ZANU Central Committee very much relied on the Department of Defence and the Commissariat (Mazarire 2011: 570). It cannot be disputed that the military elites have actively worked for regime survival as well as protecting the legacy of the liberation struggle. The land restitution issue ‘sucked in’ the military to defend the party-state, Zimbabwean independence was under siege from empire and her cohorts hence the military had to take a position. This is why President Mugabe said, “We are in a state of political war. We are in a war to defend our rights and the interests of our people. The British have decided to take us on through the MDC” (Blair 2002: 250). It could not be fathomed in ZANU-PF political circles that Zimbabwe

would become a “colony again.” It catalysed the military into political visibility culminating in the much touted security sector chiefs’ pronouncements. Zvinavashe, the chief of the armed forces, flanked by the security heads of different services made a televised declaration that:

We the (JOC) wish to make it very clear to all Zimbabwean citizens that the security organisations will only stand in support of those political leaders that will pursue Zimbabwean values, traditions and beliefs for which thousands of lives were lost in the pursuit of Zimbabwe’s hard-won independence, sovereignty, territorial integrity and national interests. To this end, let it be known that the highest office in the land (the presidency) is a strait jacket whose occupant is expected to observe the objectives of the liberation struggle. We will therefore not accept, let alone support or salute, anyone with a different agenda that threatens the very existence of our sovereignty.

The above declaration was made eight weeks before the March 2002 electoral contest between Tsvangirai the Movement for Democratic Change opposition party leader and President Mugabe. As a matter of fact the utterances by the security chiefs were introductions to a new phenomenon where the national defence policy was being redefined as that of preserving the party-state (Chitiyo and Rupiya 2005: 351). There was now a symbiotic interdependence between the military and ZANU-PF politicians. There was nothing wrong with the service-chiefs’ pronouncements since they are the guarantors of Zimbabwean security and peace. Chitiyo and Rupiya wittingly observed that the declaration by the Zimbabwean “securocratic-king-pins” meant that “Zimbabwe essentially became a military enclosure. It was essentially to defend the gains of the liberation struggle that were brought to finality through land restitution. In this respect they were not declaring support merely to the party but to the entire nation including the living, the dead and the progeny, the past, the present and the future of the nation.

The Zimbabwean eco-political developments embedded in the Chimurenga is a part of a history that cannot be wished away and explains why ZANU-PF is seen as representing the hopes of the

masses taken advantage (Britz and Tshuma 2011: 172), of by empire through the Human rights talk, respect of the rule of law and democratisation. Dr Simbi Mubako, commented that “the west demonised the country and portrayed Mugabe as a leader who had developed the horns of a demon and a tail. He is called a tyrant, a thief and a corrupt monster, with all the epithets that the West heaps upon Third World leaders” (Gowland 2002: 5). It would have been political naivety for Mugabe not to respond. In response, ZANU-PF accused Britain and its allies of ‘evil’ machinations and for deliberately violating Zimbabwe’s sovereignty principle as enshrined in the United Nations Charter. Mugabe shrewdly cast Britain-Zimbabwe relations as a melee between Zimbabwe and an ‘evil’ neo-imperialist country bent on wanting to influence events in its former colony whilst on the other hand the British viewed Mugabe’s government as having overstayed and no longer had any clue of how to effectively manage the former jewel of Africa. The ZANU-PF politicians had pledged to right the colonial wrongs by redressing the political, social and economic inequalities that had been hampered by various factors ranging from the restrictions of the Lancaster House Constitution and the continued meddling of empire in Zimbabwe’s internal affairs.

Mugabe made use of Pan-Africanism, calling for solidarity and empowerment of Blacks who had historically endured exploitation to finish the “unfinished business” through indigenisation programmes that promoted the beneficiation of Africans from their own resources. Mugabe, the Pan-Africanist leader was under attack from his erstwhile detractors, the neo-colonialists; he thus “projected himself as the candid sentinel-in-chief against Western domination and exploitation of Zimbabwe and Africa” (Gowland 2002: 261). He astutely situated his defence in the anti-colonial discourse. The Third Chimurenga became a well-executed strategic response for political survival. It was a knee-jerk radical reconfiguration of Zimbabwean politics, race relations and land ownership and Jonathan Moyo popularised the idea that Zimbabwe was fighting a third war of liberation against neo-colonialists and western neo-imperialists (Gowland 2002: 261).

President Mugabe picked up the mantle in his campaign trail and declared, “We are not going to give up our country for a mere X on a ballot. How can a ballpoint pen fight with a gun?” (Musavengana, n.d: 28). He clearly intimated to all and sundry that the military are the ones who determine who would occupy the highest office in the land. Major General Engelbert Rugeje while attending the burial of Brigadier Chimombe was quoted in the Financial Gazette of the 19th of June 2008 saying,

This country came through the bullet, not the pencil. Therefore, it will not go by your ‘x’ of the pencil. We cannot let the efforts of such people as the late Chimombe to liberate this country just go to waste (Musavengana, n.d: 28).

It must be noted that the foundation of national liberation, “whatever the formulas adopted in International law, is the inalienable right of every people” to define and determine their own history. The liberation war had been fought for Zimbabweans to reassert their national productive forces and this is firmly fixed in the land. To show that he was in conformity with the military, President Mugabe was quoted saying,

The war veterans came to me and said, President, we can never accept that our country which we won through the barrel of a gun can be taken by merely an ‘x’ made by a ballpoint pen. *zvino ballpoint pen ichamwisana ne AK?* (Will the pen fight the AK rifle?) Is there going to be a struggle between the two? *Liyekele ukhupikisana lombhobho* (do not argue with a gun) (Crisis in Zimbabwe Coalition: 10).

Mugabe bluntly made it known to the electorate that those who had participated in the liberation struggle and those serving in the military together with the ZANU-PF ruling clique would determine the path that the country would follow and there were no two ways about this. The Zimbabwean military intervention in political affairs has become the bedrock of defending the Chimurenga ethos, they have become the core of the political decision making processes. Army Chief of Staff Major-General Chedondo ‘advised’ the soldiers,

The Constitution says the country should be protected by voting and in the 27 June presidential election run-off pitting our defence chief, Cde Robert Mugabe, and Tsvangirai of the MDC-T, we should, therefore, stand behind our Commander-in-Chief. Soldiers are not apolitical. Only mercenaries are apolitical. We have agreed to fight and protect the ruling party's principles of defending the country (Crisis in Zimbabwe Coalition: 11).

In October 2012 Justice Minister Chinamasa in an interview with the BBC vowed that even if the MDC were to win the 2013 elections the military would not accept such an electoral victory. He said,

He (Tsvangirai) cannot win. He has been campaigning and mobilising against the interests of Zimbabweans on many issues, whether talking about land, seeking to reverse the gains of the liberation struggle to gain control over our resources. Many friends died and are buried in unmarked graves. Now if anyone is going to say: "when I come into power I'm going to reverse that," then the military have every right to say; "please you are asking for trouble. You will be asking for trouble" (Mavhinga 2013: 17-23).

On the 6th of December 2012, to show their support and loyalty to His Excellency and commander-in chief of the defence forces, General Chiwenga, Army commander Sibanda, Air Force Commander Air Marshal Shiri, Police commissioner Chihuri and head of the prisons services, retired Major General Zimondi attended the ZANU-PF annual conference in Gweru. During the same month Major General Nyikayaramba addressing people at Firimoni business centre in Chikomba, Mashonaland East province without mincing words told the gathering that voting for the MDC meant embracing Empire which meant selling out. The army would not deviate on issues of defending Zimbabwe's independence. On the 4th of May 2013, General Chiwenga dismissed allegations of having met Tsvangirai to discuss security sector reforms that the opposition leader was calling for. To show that the military did not respect Tsvangirai as the then Prime Minister of the Republic of Zimbabwe, he told the Zimbabwe Sunday Mail journalist that,

We have no time to meet sell-outs. Clearly Tsvangirai is a psychiatric patient who needs a competent psychiatrist.... it's just not possible for me to entertain the MDC-T leader, we are different. Just like oil and water, we cannot mix. As the defence forces we will not respect or entertain people who do not value the ideals of the liberation struggle. Meeting such people will be a mockery of the thousands of people who sacrificed their lives fighting for the country's independence. Who the hell does Tsvangirai think he is? No one can make us turn our back on the ideals of the liberation struggle (Mavhinga 2013: 17-23).

It was during the period from 2000-2013 that Zimbabwe saw the commencement of a decisive phase in the country's political history. It was a phase that saw Zimbabwe's colonial history being used as the most central feature in determining the interactions of the politicians and the military; and the peasants. Scarnnechia states that perhaps the most dangerous anachronism of the current ideology, linked and used as a defensive mechanism with the ZANU-PF leadership, is its appeal to an older Pan-African opposition to racial subjugation. The above views were the basis of the liberation war logic that was now being recast into a global context where Tony Blair, in particular, represented an unrepentant, unyielding 'Rhodies or Rhodesia spirit bent upon keeping Zimbabweans from achieving full economic emancipation through indigenisation. Is globalisation not an alias for empire? Mugabe in one of his speeches stated that,

Today, Britain, America, New Zealand and Australia, what colour are they? White. They are the ones leading in the fight against Zimbabwe, the fight of resting the completion of the independence process that began in 1980. We are not made as a government in Washington. Let Mr. Bush know that. We are made as the government by our people here. Let foolish Blair also know that (Scarnnechia 2006: 234).

Zimbabwe was thus engaged in a war against a hypocritical western world. Pan-Africanists view the MDC as a neo-colonialist

disciple and puppet of Britain and her allies, the enemy within who is against radical land restitution by Black Zimbabweans.

The state propagated the 3rd Chimurenga nationalism that was firmly entrenched in principles of being Black. Emphasis was put on issues of patriotism and unqualified loyalty to the party-state. Anybody who went against the perceived national cause (of repossessing land) became a sell-out, an enemy of both the nation and the party. The duty of each and every 'son of the soil' and this includes the military, is that of jealously guarding the nation's sovereignty as beholden to Zimbabweans by Zimbabwe's fallen heroes and heroines. Zimbabwe thus adopted a crude form of political fundamentalism that was a fusion of nationalism and the ZANU-PF elite and rank and file interests strictly rooted in either being considered a sell-out or patriotic (Ndlovu and Muzondidya 2011: 9). Mugabe, the security chiefs, the military and others, demonstrated selfless dedication by going to stare death in the face when they fought for independence, independence that the MDC want to mortgage in their bid to gain political credit in their call for change, respect for human rights and the rule of law. The Zimbabwean masses have shown how grateful they are by giving unconditional support to the land restitution exercise (Ndlovu and Muzondidya 2011: 9). The Third Chimurenga became a means to an end, carrying the decolonising agenda to its logical end, the reason why Mugabe said,

This country is our country and this land is our land.... They think that because they are white they have a divine right to our resources. Not here. The white man is not indigenous to Africa. Africa is for Africans. Zimbabwe is for Zimbabweans (Britz and Tshuma 2011: 237-58).

It is conceivable that the military continue to support the party-state because of their opposition to colonialism and neo-colonialism. This has shaped the politics of post-independent Zimbabwe and will certainly have a domino effect on other Southern African countries that are still having problems with unresolved colonial land issues. The conflicting neo-liberal narrative became an influential source of

policy action in Zimbabwe and became central to the local and regional responses to the Zimbabwean crisis as it played out. President Mugabe received standing ovations when he attended Thabo Mbeki's inauguration in 2004 that Harry Mashabela exclaimed, "Mugabe is speaking for Black people world-wide." In a Helen Suzman Newsletter he wrote "the applause and standing ovations (are) a tacit expression of the courageous stand Mugabe has taken in trying to resolve the critical land problems facing his country" (Alden and Ward 2006: 3). This was 'Mugabe the Prince,' the African leader who stood up to the insincerities of drivers of regime change. Zimbabwe is thus, "a survivor of economic dislocations and disarticulations; targeted measures and sanctions; explicit exogenous challenges from the Global North as well as endogenous challenges from the civil society; and the MDC" (Moyo 2015: 62). Contrary to Blair's attacks Mugabe's nationalist brand could not be resisted hence his positionality against neo-imperialism was amplified. According to Mutambara,

Comrade Mugabe was our mentor, political strategist and orator par excellence. His speeches and every interview shaped the direction of our political consciousness and became the resource pool of our political thinking. We saw the ugliness of capitalist exploitation through his eyes. We began to perceive things through his mind. The Mugabe that refused to be treated as a second class citizen that showed courage in the face of adversities.... the rebel in him became the rebel in us (Mutambara 2014: 85-86).

This liberation history and land restitution has been the bedrock of ZANU-PF's continued existence and relevance. This therefore explains why for both the politicians and military elites the temptation to invoke the liberation discourse is impossible to avoid. Samuel Finer argues that the whole *esprit de corps* of the military is founded on the heavy emphasis on national identity (Odetola 1982: 88) which implies loyalty to the civilian command. Nyanhongo, former CIO Director (in an interview with Tendi) showed this by rolling up one sleeve of his shirt to reveal a deep scar and burn marks, to which he added'

I operated the anti-aircraft equipment in the 1977 Rhodesian attack on our Chimoio camp (in Mozambique) during the liberation war. I almost died during that attack. I cannot allow this country to go to people (Tsvangirai) who do not connect to that liberation legacy (Tendi 2013: 969).

The above citation shows the ideological affinities of ZANU-PF politicians and many of those who participated in the war. They are loyal to the party and the liberation war ideals. Those who fought against colonialism and neo-colonialism contend that the greatest democracy that is there is that which allows Zimbabweans to own their land and safeguard the ideals of the Chimurenga.

Conclusion

The issue of returning back land to its original Black owners in Zimbabwe has been a very complicated one. Land dispossession by the White settler community did not go down well with Blacks who were marginalized and pushed to live in areas with sandy soils and poor rainfall patterns. Land was one of the major reasons for the first and second Chimurenga (wars of liberation). The military had an emotional attachment to the land that they were fighting for and against all odds the land problem was not solved when Zimbabwe became independent. Empire made sure that the much needed land reclamation remained. The Zimbabwean military were thus on the fore front supporting the peasants and giving guidance to both the politicians and the military to see to it that land was given back to its original Black owners. The desire by the military to defend the ideals of the liberation struggle means that the land question will not be demilitarized as long as empire continues to meddle in land restitution processes in Zimbabwe.

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Land Policies and the Dispossession of the African Peasantry in Colonial Zimbabwe

Blessing Makunike

Introduction

The chapter undertakes a historical analysis of the land policies and struggles for land restoration by Black Zimbabweans. This study is important and relevant to the debates on land tenure arrangements and farming systems in terms of restitution, equity, poverty alleviation, economic development, and environmental sustainability. The chapter argues that the land restoration issue has been of fundamental significance even during the liberation struggle. Hence the post-independence Zimbabwe African People's Union Patriotic Front (ZANU-PF) government continued to emphasize Black Zimbabweans' ownership and access to land as a key measure of national liberation. As such, the Zimbabwean post-independence land policies are intended to correct the colonial dispossession of African land, while ensuring equity and effective utilization of the land resource in the country. The chapter employs a historically and sociologically grounded approach of critical social theory, which places social conflicts and power relations at the centre of the analysis of land conflicts and impoverishment in Zimbabwe. It gives an historical overview of the colonial origins of the land restitution and agrarian questions. It also examines the colonial alienation and allocation of different property rights and tenure systems on the basis of race. The chapter covers the period from 1888 to 1979. Zimbabwe gained independence in 1980 which marked the formal end of the colonial period. However the country continued to be informally dictated to by the Western governments and by the international institutions that are controlled from the West.

The chapter relies on Palmer (1977) and Moyana (1984), given their widely recognized and incisive historical interrogation of land

issues in colonial Zimbabwe. The two authors provide a broad treatment of the land restitution question in colonial Zimbabwe. There are few studies with a holistic perspective that analyse the root causes of impoverishment and social tensions within a framework that embraces the historical context of contestation over land and other natural resources associated with it. The few contemporary studies on impoverishment, reclamation of land [and conflict over land] ignore the broader historical base and the diverse and complex dimensions of the impoverishment-land ownership nexus, in terms of the various actors and their strategies since the colonization of Zimbabwe. Indeed, land conflict in Zimbabwe has a long history, which is often conveniently ignored by some scholars, media and “civil” society organisations that focus superficially on the supposed and exaggerated “evils” of reclaiming and acquiring the land from white farmer-beneficiaries of colonial robbery.

Background to the Land Policy

The land question has always been and remains at the centre of Zimbabwe’s political, economic, legal, cultural and social development. Indeed, now as in the past, it remains the root of the political tension within the country and with the former colonial power, Britain. The advent of European settler occupation of Rhodesia in September 1890 is the genesis of the dispossession of Blacks whose land has been looted by the settlers. The 1893 invasion of the Ndebele Kingdom, led to the creation of the Gwaai and Shangani Reserves. The 1896-7 Shona and Ndebele first Chimurenga/Imfazwe (war of liberation) and the nationalist struggle in the period before and after the Second World War were also reactions to colonial invasions and dispossession. The second Chimurenga/Imfazwe, which gave birth to the independent Zimbabwe in 1980 bears testimony to the centrality of the land restoration issues. Although the contentious Lancaster House Constitutional negotiations and the agreement in 1979 tried, using some clauses, to block postcolonial land restitution struggles, the current internal political developments underscore the fact that the land issues are so central to African independence struggles that they

could not be easily blocked by provisions within independence negotiation.

The systematic colonial disposessions, of Africans, were realized largely through violence, war and legislative enactments. These colonial dispossession processes led to the racially skewed land distribution and ownership patterns that, until recently, were a stark characteristic of Zimbabwe. The argument, mostly shared among Eurocentric old-guard Marxists is that the essential reasons behind the wholesale colonial dispossession of land, in Africa, were to prevent the African peasants from becoming a competitor to the European farmer or plantation owner. It is further argued by such Marxists that the intention was to impoverish the African peasantry, to such an extent, that the majority of adult males would be compelled to work for the Europeans, in the mines or on the farms. It is argued here that these two motives did become apparent in Rhodesia in later years, but they cannot be used to explain the initial alienation of land in the 1890s. For an explanation of this, we must turn to the commercial and speculative nature of the European occupation and to the African tradition of “war and territory” that will be referred to later.

Having regard to the political and related problems arising from the Boer controlled Witwatersrand gold field in the Transvaal, Cecil John Rhodes, then Prime Minister of the Cape, and through his British South Africa Company (BSAC), became fixated with the idea of developing a second Witwatersrand (Second Rand) to the north of the Limpopo river. Palmer (1977) notes that the BSAC had been founded, in 1889, at Rhodes’ insistence, expressly for the purpose of exploiting the lands to the north of the Limpopo and also with a view to compensating Rhodes and his associates for their failure to strike riches on the rand.

Rhodes also anticipated that a rich Mashonaland would act as a counterweight to the Transvaal, and so reassert British political supremacy in South Africa (Palmer, 1977). The Company’s attention, therefore, was focused firmly on the rapid discovery and exploitation of mineral resources; all else, and especially “native policy”, was of secondary consideration.

The Rudd Concession

According to Moyana (1984), Lobengula, King of the Matebeleland, in 1888, was tricked [through his aide by the name Lotshe] into signing a document that came to be known as the Rudd Concession, which paved the way for the BSAC's occupation of the country. The Concession, fraudulently obtained from King Lobengula, became the vehicle through which colonialists subsequently obtained mineral rights in Mashonaland.

The Rudd Concession enabled Rhodes, under a Royal Charter granted by the British government, to occupy the country. The Royal Charter, obtained in 1889, among other things, granted the BSAC authority to administer and govern the region that encompasses the present day Zimbabwe; the duty to preserve peace and order in such ways and means as it should consider necessary; the power to pass Ordinances and to establish and maintain a police force; and the power to make land grants (Tshuma, 1997:14). The Charter was granted notwithstanding King Lobengula's protestations that he had been deceived. Lobengula repudiated the Rudd Concession stating that he would "not recognize the paper, as it contains neither my words nor the words of those who got it". The response, by Queen Victoria, to King Lobengula's protestation to this development was that it "would be unwise to exclude white men" (Report of the Presidential Land Review Committee, 2003:11).

Tshuma (1997) observes, further, that the Charter was predicated on two assumptions: that Lobengula, as sovereign, had [untrammelled and corruptible individual] title to land: and that he could delegate power to the Company to make land grants. The premises upon which the Charter was based were questionable for two reasons. As such, he was deemed to have unencumbered jurisdiction, as an individual signatory, over a physically spatially demarcated territory, comprising Matebeleland and Mashonaland. Indeed, a number of Shona polities were not under Ndebele rule. Another assumption, deriving from English jurisprudence, was that Lobengula as Ndebele sovereign had proprietary title in the Shona territories. Lobengula did not have the capacity, as an individual, to summarily sign away the land. Indeed in all jurisdictions, individuals

can only sign away contracts on the bases of considerations of the rules of the entire society as enshrined in the applicable [collective] laws. In this regard, I would argue that what the colonists [erroneously] assumed was that African sovereigns were corruptible—indeed their crime was that of corrupting and cheating African sovereigns. Africans had sovereignty over their territories [even before the coinage of the term sovereignty (Ramose, 2014)] just as Europeans had sovereignty over European territories. Therefore, the difference was not that in Africa there were no sovereigns, whereas in Europe there were sovereigns: rather the difference was that colonists hailing from European sovereign territories sought to cheat and trick African sovereigns—they assumed that in Africa there were cheatable and corruptible sovereigns, which they have created [alongside corruptible intellectuals] over the centuries of colonialism. Their error was not in assuming that there were sovereigns in Africa, rather their error was in assuming and creating the existence of cheatable and corruptible sovereigns on the continent.

The legal position was however of academic interest, as Company (BSAC) practice regarding land differed from the formal legal position. Once in possession of the Charter, the Company wasted no time in assembling an “invasion force” which set for Mashonaland and started subduing the Shona and establishing administrative structures.

The Rudd Concession was countered by the Lippert Concession of April 1889, which reflected competing European interests including German interests and aspirations, to acquire territory (Report of the Presidential Land Review Committee, 2003). This Concession was also deceitfully obtained from Lobengula. With the connivance of the British government, and without Lobengula’s knowledge, the Lippert Concession was soon purchased by the BSAC.

In 1890, the BSAC established rule over Rhodesia and launched a period of Company rule, which lasted for about 25 years (Report of the Commission of Enquiry into Appropriate Agricultural Land Tenure Systems, 1994). The Pioneer Column arrived on 12 September 1890 in the land they were to call Rhodesia. They numbered 196 Pioneers and 500 police. At this time there were

approximately 700 000 Africans, mainly Shona and Ndebele speakers in the territory (Chitiyo, 2000: 64).

Gold was the prime motive behind the occupation, and land was regarded very much as a consolation prize. As one of the Company's directors put it in 1891, "When cattle and gold were in competition for men's attention, nobody thought of cattle" (Palmer 1977: 26). Thus, while each of the 196 pioneers was promised, verbally, a free farm of 1,500 morgen (3,175 acres) and 15 reef claims of 400 by 500 feet, for political reasons, no undertakings on paper could be given. It was the gold claims, which were the more highly prized, and many pioneers sold their land rights to speculators.

Indeed, within a fortnight of the column being disbanded at the end of September 1890, there were estimated to be nearly 300 prospectors seeking their fortune in the area between Hartley and the Mazowe valley, and by February 1891, some 700 claims had been marked off. (Palmer, *ibid*: 26). But the gold, which the pioneers had hoped to find in large quantities in Mashonaland, had been disappointingly scarce (Moyana, 1984: 38). Not only did it rapidly become obvious that some mysterious "ancients" had long departed with the bulk of the dispersed gold deposits, but the rainy season of 1890-1 was exceptionally severe and protracted and many prospectors, inadequately equipped with clothing, food and medicine, contracted malaria and died. The Company's mineral rights, which ironically were to prove far less valuable than those acquired more casually in Northern Rhodesia, were based on the controversial Rudd Concession of 1888, and was upheld by the British government. The land rights proved more elusive. In July 1891, High Commissioner Loch attempted to assert some degree of imperial control by suggesting a land settlement in favour of the Crown, in order to "protect" African interests. The colonial office declined by suggesting that such interests were adequately protected under the Company's Charter (Palmer, 1977). A quarter of a century later, the Crown entered a claim at the Privy Council, to the ownership of the un-alienated land of Rhodesia.

Meanwhile, in the absence of direct Crown intervention, Lobengula attempted to divide and rule the Europeans. According to Palmer (1977), for some years, concession hunters of one kind and

another, including Renny-Tailyour, the emissary of Edourd Lippert, had besieged him. Lippert was a German financier based in Johannesburg. Lobengula decided to grant a land concession to Renny-Tailyour on the assumption, valid at the time, that Rhodes and Lippert were bitter rivals, and under the mistaken impression that Renny-Tailyour was a representative of the British agent in Switzerland. Lobengula hoped to create confusion in the European ranks, from which he thought he would profit. The Lippert concession was accordingly signed on 22 April 1891. The British High Commissioner and the Company were at first inclined to oppose this concession on various grounds, amongst others, on the grounds that its validity was doubtful. But after several communications and interviews of the Company's officials, with Mr. Lippert, it was decided that it would be better to come to terms with him and take over the concession, provided that ratification of it was obtained from Lobengula, as it would provide an assurance that the Concession was genuine and one on which the Company might safely proceed. With this object, Renny-Tailyour, who was well known to Lobengula and who had his confidence, was promptly sent back to his kraal in Bulawayo.

Naturally, the British Government did not inform Lobengula of the agreement reached between Rhodes and Lippert, while the Resident Commissioner, Mr. J.S. Moffatt, offered his cooperation with extreme reluctance, for he informed Rhodes that the whole plan was detestable, whether viewed in the light of policy or morality. He was subsequently sent back to Bechuanaland, on a reduced salary, but the Concession was ratified by Lobengula on 17 November 1891 and duly confirmed by the Colonial Secretary, Lord Knutsford, on 5 March 1892 (Palmer, 1977).

The defective and fraudulent Lippert Concession granted:

The sole and exclusive right, power and privilege for the full term of 100... years to lease out, grant, or lease... farms, townships, building plots and grazing areas; to impose and levy rents, licenses and taxes thereon, and to get in, collect and receive the same for his own benefit; to give and grant certificates... for the occupation of any farms, townships, buildings plots and grazing areas (Palmer, 1977: 27).

Lobengula, of course, had no right, in customary law, to make such a grant as far as the Ndebele homeland was concerned, for land was not a marketable commodity; still less did he have the right to sign away land over the whole country. But the legal fiction, that Lobengula controlled the whole of Rhodesia at least saved the Company the bother of tracking down the Shona Chiefs and “persuading” them to sign treaties as what was happening in neighbouring northern Rhodesia. Chitiyo (2000), posits that traditionally, land ownership among the Shona was a “communal” process, operating at different levels, that of family, clan and village. Chiefs [like any other state officials and leaders] were essentially functionaries who allocated land in the best interests of their constituency. Among the Ndebele, the King and his Chiefs had more direct power with respect to land allocation and intervention. Both peoples also believed that the real landowners were the ancestors and that particular lands were sacred. While this might appear radically different from the British system, it is necessary to note that even in the British system their [traditional] Queen or royalty is the sovereign [that own and controls colonial territories] and so British colonists sang “God save the Queen” during the colonial encounters (Nhemachena, 2016; Nhemachena and Mtapuri, this volume).

Moyana, (1984), concurs that the traditional land tenure system also provided that land rights were inalienable from Africans. Land belonged to the living and to the unborn as well as to the dead. No member of a group could sell or transfer land to an outsider, as land was considered a Godly endowment in the same category as rain, sunlight and the air we breathe. In traditional African economy, there could be no commodity more valuable than land and no circumstance in which it could be profitable to dispose of it. The belief, that to completely dispose of land was not allowed, was widely held. Individual ownership was hedged, as every individual was entitled to the Godly endowment mentioned above.

Be that as it may, Palmer (1974) observes further that, although the Lippert Concession was declared “valueless” as a title deed by the Privy Council in 1918, Rhodes did not think so at the time, for he bought it from Lippert for 30,000 British South Africa Company shares at £1 each, 20,000 United Concessions Company shares at £1

each, and 500 cash, plus land grants of 32,000 acres in Mashonaland and 48,000 acres in Matebeleland, which was still under Lobengula's control (Palmer, 1974:28). A similar occurrence took place in the Eastern districts of Rhodesia, where land was parcelled out to Europeans before the Gungunyana Concession had received British approval. The end result of the whole exercise was that the Company was now "legally" entitled to issue titles to the many "provisional" grants of land, which it had already made to the settlers.

When the pioneer column occupied Mashonaland in 1890, it was careful to avoid a direct clash with the Ndebele State, which was well-known for its formidable military machine (Palmer: 1977). Thus, no coherent "native policy" evolved in Mashonaland in the years 1890-3. According to Moyo (1984:38), the other reason was because of article 14 of the charter, which read:

Careful regard shall always be to the custom and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and dispossession of lands and estate or intestate succession thereto.

However, it was unrealistic to expect several thousand Europeans to rush around digging for gold and pegging large farms in Mashonaland, without making any contacts with the Shona, especially as the demand for labour increased. In fact, the settlers frequently took the law into their own hands with disastrous consequences. The result was a number of conflicts including the Anglo-Ndebele war of 1893.

According to Moyana (1984), when the Mashonaland gold rush proved futile, much to the displeasure of the Company, Chartered shares began to fall alarmingly on the London stock market. Many pioneers trekked disconsolately back to South Africa as the Company's initial capital was nearly exhausted. There was also the constant threat of confrontation with the Ndebele, who were beginning to realize the full implications of the Company's presence in Mashonaland. In such circumstances, Rhodes turned his acquisitive eye towards Matebeleland, whose mineral resources, he hoped, would be greater than those of Mashonaland, and where the fertile, well- stocked high veld was an added inducement.

On August 14, 1893, Star Jameson, Rhodes' right hand man in Rhodesia, signed a secret agreement at Fort Victoria, for the invasion of Lobengula's Kingdom. Moyana (1984:38) observes that some of the clauses of this infamous document provided:

That each member (of the attacking force) will be entitled to mark out a farm of 3,000 morgen (6 000 acres) in any part of Matebeleland.... the government retains the right at any time to purchase farms from the members any member of the Victoria force is entitled to 15 claims on reef and 5 alluvial claims....

For Palmer (1977), the Company's victory was important politically and also psychologically, for it left the Europeans with a belief in their invincibility and a form of conviction that the natives were not a factor meriting serious consideration. As members of the Victorian forces seized farms wherever they wanted them, and when these were pegged out on top of each other, as they often were, they had to arrange matters as well as they could. Only after all this had been settled could any provision be made for the Matebeleland natives. The British government was not informed of the terms of the Victoria Agreement, but it would probably have ignored it, in any event.

In the face of such activities in Bulawayo, and the enormously increased prestige of the victorious Company, the British government made vain attempts to exercise some control over the post-war settlement. The colonial secretary urged that the Ndebele be allowed to settle down peacefully and be provided with "good and habitable land, water and cattle adequate to their subsistence", and that the imperial resident be stationed in Bulawayo to keep an eye on the Company (Palmer, 1977). Such intentions flew in the face of reality and infuriated Rhodes who pointed out that the Company had won the war and was entitled to dictate the peace. However, this insistence is strange particularly when looked at from the illogicality and savagery of a stranger who would claim to have won a war [over someone else's house] and then seeks to dictate the peace terms that include settling in someone else's house. Had the British government insisted on taking a firm stand, they would have antagonized virtually

the whole of the white South African opinion at a time, when they were desperately seeking to retain the loyalty of the Afrikaners in the Cape. Not surprisingly, Rhodes had his way.

The Land Commission

To the extent that the Company dictated the post war settlement in Matebeleland, Rhodes made it clear that the Company had no intention of providing free land for Africans as their numbers increased (Palmer, 1977). The British government issued an Order-in-Council, on July 18, 1894, which announced the appointment of a Land Commission to “deal with all questions in relation to the settlement of Africans in Matebeleland” (Moyana, 1984:39). The Commission’s brief was to assign without delay, to the natives inhabiting Matebeleland, land sufficient for their occupation, and suitable for their agricultural and pastoral requirements, including in all cases a fair and equitable proportion of springs or permanent water.

The land Commission was appointed on 10 September 1894 and, with haste typical of the period, produced its reports on 29 October, assigning two large native reserves, Gwaai and Shangani estimated to be 3,000 and 3,500 square miles respectively (Palmer, 1977). Moyana (1984) points out that these lands were, however, badly watered, sandy and unfit for settlement. The soil type of the region was that of Kalahari sands, which are of very low natural fertility and which are known for their peculiar hydrological content. Shangani lay entirely within the tsetse fly area. Moreover, the two reserves had a total acreage of “approximately 2 486 00 hectares, which represented a reduction of about 7.5 million acres from the 21 million which the Ndebele used to occupy” (Moyana: *ibid* 39).

The inadequacy of these lands, for the Ndebele needs, was perhaps manifested by the Ndebele refusal to occupy them. The colonial office admitted that “the Ndebele regarded the two reserves as cemeteries and not homes” (Palmer, 1977:22). However, the Ndebele who refused to move to the two reserves, soon found themselves living on European farms, where they were subjected to high rental charges or eviction. Alternatively, they could pay for their

residence on the European farms with their labour. Thus, Africans lost their rights to the ownership of land and the principle of land segregation had now been adopted as a necessary ingredient of native policy in Rhodesia.

It was the dispossession of the African of suitable lands for cultivation and for pasture that created the discontent that found expression in the first Chimurenga of 1896-1897. Chitiyo (2000) observes that although this war was partly against European seizure of land, it was also a protest against hut tax and the simultaneous environmental calamities of rinderpest, locusts and drought. The locals believed that the invaders were destroying the balance of nature. After a ferocious one-and-half year war, the Africans were defeated and the Europeans created a colonial state. In the process, they institutionalized the land problem that successive governments were to grapple with and fail to resolve.

Land under the Colonial State

In 1898 another Southern Rhodesia Order in Council made it obligatory upon the Company administration to assign sufficient land for African-Land use. Moyana (1984:41) observes that under article 81 of the new Order-in-Council, the Company was required, from time to time, to “assign to the natives inhabiting Southern Rhodesia land sufficient for their occupation whether as tribes or as portions of tribes and suitable for their agricultural requirements”. It is argued, here, that sufficient land for Africans seems to have been interpreted by the settlers to mean areas into which an overflow of Africans, who could not be accommodated as labourers on European farms, could be settled. The term “reserve” clearly carries such a connotation.

The Native Reserves, which were created soon after, are known as the Communal Areas today (Report of the Commission of Inquiry into Appropriate Agricultural Land Tenure Systems, 1994). According to Moyana (1984), Native Commissioners were empowered to carve out land for the “collective use” of indigenous people. But it does not appear that any precise instructions were issued to the Native Commissioners, as to the principles to be followed in selecting areas for these reserves, nor were they given any

uniform basis upon which to calculate the amount of land necessary in proportion to the population it was intended to carry.

Moyana (1984), further notes that Native Reserves were usually far away from the railroad and from the plateau. Most plateau land had, by 1902, been parcelled out to European farmers, who also chose the heavy red and black loam soils, which had been favoured by the indigenous people prior to 1890. It is argued, here, that while it is true that one or two Native Reserves possessed good soil, it is also true that an overwhelming number were unproductive and could not support the dense African population, which was meant to seek livelihood on them. Furthermore, geographically, the majority of the reserves were in the middle of the low-veld, where the rainfall was inadequate for the successful cultivation of crops. The policy of Native Reserves meant, in essence, that Africans had lost control over much of their land.

The Native Reserves were important precisely because they survived, with a good deal of amendment but recognizably in the same pattern, down to the present. This was certainly not foreseen, at the time by H.J. Taylor, the Chief Native Commissioner for Matebeleland, who, in 1904 expressed the view that reserves “involve the negation of all progress, and should be regarded only as a temporary makeshift” (Palmer, 1977:22).

The reserves, therefore, were not initially designed to be the African’ share of the land; they were essentially ad hoc creations, intended to solve the post-war refugee problem, and to provide some place or other where the natives could escape being required to pay rent. Indeed, the general expectation, shared by Company and imperial officials alike, was that as the country developed and Africans were sucked into the money economy, so the need for reserves would disappear. The aim was to turn Africans into wage labourers, as rapidly as possible and integrate them into an economic structure based on class. Such was the “doctrine” which was generally accepted in the years before the serious development of European farming and settler political power, which between them led to the espousal of a new doctrine based on segregation.

Ironically, discontent over the distribution of land first came from the settlers and not from the Africans (Moyana, 1984). At this

time Africans lacked both the leadership and means with which to challenge the European principles of injustice and misgovernance. The moment a European pegged his farm, he regarded the African villagers on it as his 'serfs' who would have to work for him. The chief means of mobilizing this pool of labour, in the first years was the "sjambok" or hippo-hide whip, and after 1908, labour agreements, which committed tenants to work several months, for the privilege of remaining on the white farms. It became common practice for the speculator to judge the value of land largely by the number of Africans living on it, from whom he could extort a handsome income by charging them rent fees. For these reasons it was economically unsound for the landowners to evict the African tenants from their lands. Palmer (1977) concurs that the Company therefore decided to attack absentee landlords in particular; the large land companies and syndicates, and it determined a policy of beneficial occupation or surrender. In doing so, however, it came into direct conflict with settler representatives in the new Legislative Council set up under the 1898 Order in Council.

African Land Purchase

According to Palmer (1977), the Southern Rhodesia Order in Council of 1898 proclaimed, as had the 1894 Matebeleland Order, the right of Africans to "acquire, hold, encumber, and dispose of land on the same conditions as a person who was not a native". Thus, while the Native Reserves were set aside for "traditional" communal occupation, individual Africans with the necessary capital and expertise could buy freehold farms in exactly the same way as the White settlers.

However, debate in respect of the above, followed four lines of thought: first, that the principle of allowing Africans to buy land next to European farms was bad, since it would not enhance the value of surrounding farms because Europeans would tend to buy such land; second, that the interests of white farmers and Africans were best served by keeping the latter in separate areas, and that Africans would not improve any land which they bought; third, that Africans should not be granted equal footing with Europeans and; fourth, that no

Africans should ever be allowed to own land as' there was no hurry for them to rise from their position of inferiority' (Palmer 1977: 62). Further, Europeans feared the dangers of stock thefts and diseases, trespass and molestation of white children. They also questioned why one would want contact between the two races over and above that brought about in various spheres of labour.

This led to a general policy, which was in total conflict with the terms of the Order in Council, and which persisted throughout the Company's period of administration. On the one hand, it refused all African applications for land, though it could not prevent individual Europeans from selling land to Africans. While on the other hand, it reflected all European demands for the law to be changed, arguing that there was little point in risking conflict with the British Government on an issue over which the Company was largely in control.

The argument contained in this chapter is that while the question of African land purchase was, at the time, a small and relatively insignificant one, since very few Africans indeed were in a position to compete for land in this way, it subsequently assumed a much wider importance and was in fact the direct precursor of the great segregation debate of the 1910s and 1920s, and the land Appointment Act of 1930.

Fortunately, the full implications did not become apparent for a number of years; indeed some Native Commissioners had no wish to disturb Africans by telling them that a division of the land had been done. The Chief Native Commissioner for Matebeleland thought it unwise to mention the matter as "it would inevitably lead to a good deal of discontent amongst the natives, as they were much too primitive to understand the portioning out of land"; while other Native Commissioners refrained from pointing out the reserve boundaries in order "not to worry the minds of the native prematurely" (Palmer, 1977:71).

However, such a fiction could only be maintained for a short period within the reserves, or alienated land, or in cases where European owners neither occupied their land nor charged Africans rent for living on it. It is argued, here, that as soon as landlords began to impose rent or labour agreements, Africans were only too aware

that a land division had been made. According to Palmer (1977) this awareness was to spread rapidly after 1908, with the initiation of the Company’s agricultural policy.

White Farmers and Black Peasant Farmers

This chapter recognizes the notion that whereas in South Africa, it was the mineral revolution, which ultimately led to the impoverishment of the African peasantry, in Rhodesia, paradoxically, it was the absence of such a revolution, which had much the same effect. Palmer (1977) observes that in 1907 BSAC directors toured the country and decided that the time had come to put an end to the myth of the “second rand”. The myth had persisted for so long, partly because mineral exploitation had been severely hindered by the Risings of 1896-7 and by the South African war of 1899-1902, which had cut Rhodesia’s rail links to South Africa. A brief mining boom followed the end of the war, but this collapsed in the financial crisis of 1903-4. The Company concluded that it was essential to diversify the economy and that the best way of doing this was to encourage European farming, thereby promoting greater economic self-sufficiency, cutting the import bill, and raising the value of land and providing more traffic for the railway, both of which at the time were owned by the Company. This “white agricultural policy”, as it was called, which began in 1908, was ultimately to affect, radically, the position of Africans on the land.

In pursuance of this new policy, the Company launched an attack on the Native Reserves in the years 1908-14, with the intention of recovering all the best land and making it available for European settlement. Land distribution was as follows:

Table 1, Land Apportionment in Southern Rhodesia, 1911

<u>Category</u>	<u>Acres</u>	<u>% of Country</u>
European area	19 032 320	20.7
Native Reserve	21 390 080	23.2
Unassigned	51 628 800	56.1
Total	92 051 200	100.0

(Source: Moyana, 1984:42)

However, because European agriculture was labour intensive rather than capital intensive, and the natives, particularly the Shona, opted out of the labour market by growing a sufficient surplus to meet their tax and other commitments, there was high demand for labour. Therefore European farmers came into competition with the mines which were also labour intensive, and which could generally afford to pay higher wages.

The white farmers needed large supplies of seasonal labour, at precisely the time when local Africans needed to tend to their crops. They thus found themselves in much the same position as white farmers elsewhere in Africa, heavily reliant on migrant labour from depressed areas and demanding a reduction of African-Land holdings and a tax on such holdings. This was not going to be easy, however, and the Company began to think in terms of a Reserve Commission.

Palmer (1977) observes that Commissions of enquiry generally fall into one of three categories: those which genuinely seek answers to complex questions and hence are manned by experts; those designed as a public relations exercise by governments which have already made up their minds and hence are packed with nonentities, men who can be relied upon to produce the answers expected by government; and finally, those Commissions whose basic task is to remove a controversial issue from the heat of public debate quietly, and very slowly defuse it, which usually consisted of civil servants. In the case of the Rhodesian Native Reserves Commission, elements of the second and third categories were clearly apparent, for not only were the personnel and the terms of reference highly favourable to the BSAC, but something of a conspiracy of silence surrounded both the Commission and the subsequent debate on its work.

The colonial office agreed to the appointment of the Reserves Commission of 1914, on the understanding that the delimitation of the reserves being contemplated would be final (Moyana, 1984: 45). The colonial office urged the Company to nominate a senior officer of the Native Affairs Department, which was the watchdog for African interests. As things turned out, no Native Affairs Commissioner was allowed to serve on this Commission. The three men appointed were all either employees or ex-employees of the

Company. Clearly, such a Commission could not have been expected to deal impartially with the issues they were to investigate.

Moyana (1984) further notes that, among others, the Commission was to pay special attention to the sufficiency of land suitable for the agricultural and pastoral requirements of the Africans. It was to take into consideration, not only the present, but also the future African population. The Commissioners were expected to consult both Europeans and Africans and to recommend means of inducing Africans to make use of reserves.

Whereas the Colonial office had originally suggested an enquiry into the adequacy of each reserve, the Company argued, successfully, that the Commission be empowered to regroup the reserves, which were dotted about rather haphazardly, as this would allow new reserves to be created, “thus getting free corresponding areas, which are now Native Reserves, for other purposes” (Palmer, 1977:107).

Palmer (1977) further observes that, in its report, the Commission admitted that the increase in European Settlement had stimulated the need for a more accurate definition of the reserves, with the object of drawing a clear division between land available for Europeans and that set aside for Natives. It pointed out that land had been assigned to natives, which was not suitable for their purposes, while land eminently fitted to carry a native population had been left open. Unfortunately, at no point did the Commission state its criteria for assessing whether land was suitable for Africans or for Europeans.

The report adopted, almost word for word, the Company view, that reserves were for those who could not immediately be assimilated into European conditions, and it therefore dismissed as absurd and extreme the notion that every unborn African had “an indefeasible right to land” (Palmer, 1977:108), since in that case the whole country would eventually be needed as a reserve. To them, as education broke down the tribal system, the need for reserves would diminish. Indeed, the Commissioners assumed that the capacity of Africans to make good use of their land would keep pace with their rising population. Further, the Commissioners reported that they had not, as a rule, interviewed African Chiefs as “we considered that we might do more harm than good by questioning the Natives upon a

matter of which they were likely to misunderstand the real scope” (Moyana, 1984:48).

Palmer (1977) notes that the Commission believed that the existing reserves were more than sufficient for present and future needs. With regard to areas which were being taken from the reserves, the Commissioners suggested that Africans could either remain on the land or pay rent, or else they could move to another reserve, which would be no hardship, provided the reserves were sufficient and suitable. Finally, the Commission made a number of optimistic recommendations concerning the more efficient use of the reserves. The reserve boundaries would be clearly beacons and water supplies and adequate roads provided where necessary. It was premature to introduce agricultural schools, but Native Commissioners would encourage the use of better farming methods. Education was the greatest single factor in improving the use and occupation of land.

It is not surprising that so many of the Commission’s confident predictions for the future, which must certainly have influenced their recommendations, were to prove utterly unfounded (Palmer, 1977). Africans did not, on the whole, adopt more intensive methods of farming, since they were in the process of being pushed away from easy access to markets; water supplies did not improve the carrying capacities of reserves; the cattle market was shortly to collapse, and hence, propaganda directed at encouraging voluntary de-stocking was ignored; the population increased far beyond European expectations; and Africans did not lose their attachment to their ancestral lands, nor indeed their resentment of Europeans who had not only usurped so much land, but were also in the process of pushing more and more Africans into the least desirable parts of the country.

The Native Reserves Commission thus cut down many of the reserves within easy access of the main markets and therefore intensified the hardships on the African peasantry; while it also reduced some of the larger reserves in the outlying districts, in what was clearly an attempt to curb “idleness” and overcome the reluctance of Rhodesian Africans to seek wage-labour within the country. The next decade witnessed increasing conflict between the

racism and consequent demands for segregation, for which the Commission had provided adequate basis.

Land Segregation in Colonial Rhodesia

During the decade 1915-25, a dilemma began to make itself apparent in Rhodesia, when administrators, for the first time, addressed themselves to the question of what was to be done with the Africans. However, the majority of Europeans declined to share in the general mood of introspection. The decade witnessed important political changes which were to sow the seeds of the Unilateral Declaration of Independence crisis of the 1960s. According to Palmer (1977), in 1922, the tiny and almost exclusively European electorate rejected the opportunity of becoming the fifth province of the Union of South Africa and voted instead for responsible government. Thus, the era of Company rule came to an end, and on 1 October 1923, Southern Rhodesia, with an estimated 35,900 Europeans and 890 000 Africans, became a "self-governing colony". This meant that effective political power had passed into the hands of the settlers, who greatly enhanced their economic position, whilst simultaneously achieving political control. They were able to mount a further and increasingly successful attack on the African peasantry in order to safeguard their position.

Early officials concentrated on instilling the "dignity of labour" to the extent that they frowned upon African commercial farming. But as a new skilled elite emerged and began to buy land, use ploughs, read newspapers, and even mount a slight challenge to the established order, by forming political associations, the question naturally arose of how to channel this advance, and in particular, how to channel it so that Africans would not come into social, economic, or political competition with Europeans. The solution, which occurred to most white officials, was that of segregation.

The basic driving force behind the movement to segregation, and it is worth emphasizing in view of the complexity of motivating factors, was the intense hatred displayed by the overwhelming majority of European farmers at the idea of Africans buying land in their midst (Palmer, 1977). European farmers were opposed to the

development of an African land owning class of commercial farmers for two basic reasons. In the first place, they objected to Africans as neighbours. As labourers, or rent paying tenants, they were of course welcome, for they were beholden to the European farmer and could be evicted by him at will. But as landowners, they would have to be treated (legally at any rate) as equals. Perhaps more important, if Africans “invaded” the European farming areas they would, by and large, be taking up the better soils and have equal access to markets, and hence be in a strong position to compete with European farmers.

Palmer (1977: 108) records various opinions: “The white farmers were afraid that as the African earning capacity increased, so more and more Africans would be in a position to buy land and they wanted the law changed before this could happen. The Native Department took the view that the desire for individual ownership was progressive while giving Africans a real interest in the country and government and practically ensuring their loyalty”; The missionary attitudes tended to follow closely the Native Department, of introducing tenure into the reserves; Overt African political activity was naturally preoccupied with the inadequacies of the reserves and the problems bequeathed by the Native Reserves Commission. The BSAC’s traditional policy had always been to refuse both African applications for land and European requests to change the law; The Colonial office was not committed to a policy of segregation and preferred to await developments rather than take initiative.

For Palmer (1977), although the Native Department was much preoccupied with the segregation issue in the years 1915-25, the Report of the Native Reserves Commission, and the increasing number of Africans being evicted from European farms and forced to move into the reserves, caused the Department to rethink their whole attitude towards the land question. In the past they had tended to regard African settlement on European farms as something progressive and to be encouraged. But in the face of the prevailing attitudes of the white farmers, they gradually came to look upon the reserves as havens of rest where Africans could live relatively free from European exactions, and where they could develop along their own lines. Chiefs were also in favour of movement into reserves as

the “tribal” system could be maintained more easily than when the people were scattered over farms.

It is against such a background of racial hostility that one needs to look at the impoverishment of the African peasantry in Rhodesia. The remarkable prosperity, by many Shona farmers in the early years of the century, was brought to an end by a combination of factors. Primarily, African farmers faced the full blast of competition from heavily subsidized European farmers, while simultaneously being pushed away from easy access to markets, a process greatly facilitated by the work of the Native Reserves Commission. In addition, Africans were confronted with the ever-increasing number of costly dues, taxes, rents, dipping and grazing fees, and so on, at a time when their own appetite for consumer goods was on the increase. The end result was that when they were no longer able to sustain themselves and purchase their requirements from the sale of their agricultural produce, they would be forced to become wage labourers.

The Land Commission 1925

A Commission of three was appointed by His Majesty's Government to inquire into and report on the question of land segregation in the colony. The Chairman of the Commission was Sir Morris Carter, formerly Chief Justice of Uganda and Tanganyika. The other two members of the Commission were Sir Herbert Taylor, Chief Native Commissioner, and Mr. Atherson, Director of Lands, and formerly Surveyor General for the BSAC, who had served on the 1914 Reserves Commission (Moyana, 1984:61). The Commission started its work in 1925 and completed its work by the end of that year, and reported in favour of a policy of separate land purchase areas for Africans and Europeans (Palmer, 1977).

According to Moyana (1984), the Commission reported that the overwhelming majority of Africans also expressed a desire for land segregation. However; the Commissioners may not have clarified the issues to Africans. Many Africans were thus duped into accepting land segregation without knowing what amount and quality of land they would get and where it might be. Therefore, those who did accept the principle of land segregation did this on the assumption

that their interests would at last be satisfied and protected, which the Commissioners persuaded them to believe. But as things turned out, by accepting the principle of segregation, the Africans condemned themselves to occupying remote and infertile areas, on the one hand, and on the other, inadvertently converted themselves into serfs of the landed class of European settlers. .

The Morris Carter Commission report was approved by the Rhodesian Legislature on June 20, 1927, but was not gazetted until 1928. The Land Apportionment Bill, which resulted from the Commission's report, became law in 1930 but did not take effect until 1931 (Moyana, 1984). Under the terms of the Act, the rights of the Africans to land ownership anywhere in the colony were rescinded. As compensation for this loss, he was given the right of purchase in an exclusive area to be known as the Native Purchase Area. These areas were, as much as possible, placed adjacent to Native Reserves. To achieve this pattern, pieces of European-owned land were incorporated into the New Native Areas, while portions of the Reserves were chipped off and included in the European areas (Moyana, 1984:69).

The Native Purchase Area came under the jurisdiction of the Native Land Board, which subjected the owner of the land, in the Native Purchase Area, to inspection. He was also expected to shoulder certain responsibilities, such as fencing or the paying of taxes and other impositions which could be levied upon his land. Another category of land created by the Land Apportionment Act was the unassigned area. The Governor in Council was empowered by the Act to assign portions of the unassigned area to the European or Native Area, depending on need and would become part of the category to which it was assigned.

The third category was the European area where no African could hold or occupy land. The fourth category was the Forest Area, which was exclusively reserved for forestry. Finally, there was the Undetermined Area, which could be allocated to either Europeans or Africans.

Table 2, Land Apportionment in Southern Rhodesia, 1930

<u>Category</u> <u>Country</u>	<u>Areas</u>	<u>% of</u>
European Area	49 149 174	51.0
Native Reserves	21 127 040	22.0
Unassigned Area	17 793 300	18.5
Native Area	7 464 566	7.8
Forest Area	590 500	0.6
Undetermined Area	88 540	0.1
Total	96 213 120	100.0
Total for African Use	28 591 606	29.8

(Source, Moyana, 1984: 70)

In essence, according to Moyana (1984), the Act sought to force, into the reserves, all those Africans who had not acquired freeholds in the Native Purchase Area and did not wish to purchase ‘squattling rights’ with their labour. This provision hit hardest those who resided on European farms in the vicinity of which there were no African Reserves to move into. Further, the Act did not consider the simple fact that what counts in land is not only the quantity but also quality. In this case the African land lacked in terms of both adequacy and quality. The Prime Minister’s officer, on the other hand, maintained that Africans living on European land should be evicted regardless of whether there was sufficient land for them in reserves or not. This necessitated the revision of the Land Apportionment Act.

Land and Racial Domination

Palmer (1977) argues that the Land Apportionment Act turned out to be the most contentious piece of Legislation ever passed by the Rhodesian Government. From 1930, it occupied a prominent place in political debate, and indeed the promise to repeal it was largely responsible for the fall of the United Federal Party Government at the 1962 election. Moyana (1984) adds that in the years that followed, successive amendments to the Land

Apportionment Act were made, each seeking to facilitate the eviction of Africans from the European area. The allocation of land, on an essentially racial basis, and with no clear indication of whether or how land distribution fitted in with demographics, soil quality and climate, showed that the colonial State was essentially fulfilling a racial/political agenda with agro-economic sub-themes, rather than vice versa.

This chapter concurs with Moyana (1984)'s argument that the Land Apportionment Act, together with subsequent amendments, was the "Magna Carta" of European policy with respect to the dispossession of Africans and the distribution of wealth among settlers in Rhodesia. It was not only the cornerstone of European economic security, but also the cornerstone of all racialism, in social, political and economic areas.

As a reaction to overpopulation with both people and livestock in the Native Reserves, the Native Land Husbandry Act was passed in 1951. It was designed to enforce private ownership of land, de-stocking and conservation practices on black smallholders (Report of the Commission of Inquiry into Appropriate Agricultural Land Tenure Systems, 1994). Once again the State found a politically convenient thesis to propound its mantra of de-stocking. The view was that African reluctance to sell or kill cattle either for the market or privately, and apparent African indifference to overgrazing, lay in African Culture and tradition. Africans, it was argued, held onto their animals for prestige and status, irrespective of the agro-economic environment (Chitiyo, 2000). In other words, it implied that Africans' societal norms overrode agro-environmental development.

The administration began using persuasion and force to ensure compliance with its policies. Chiefs and headman were rewarded with money, regalia and other tokens of State appreciation, if they persuaded their people to peacefully comply with the provisions of the various Land Acts (Chitiyo, 2000). The carrying capacity of each Native Reserve was laid down and Chiefs and headmen were given "culling quotas" that their villages had to meet. Failure to meet these quotas resulted in the chief and sometimes the entire village having to pay fines. In other instances, police confiscated the "excess" cattle from the villagers without compensation.

In 1963, the hard-line settler conservative party, the Rhodesia Front, took office. Primarily supported by white farmers, the Rhodesia Front's mandate was to pull Southern Rhodesia out of the Federation with Nyasaland, cut links with Britain, and entrench white minority rule. Thus, the Native Land Husbandry Act was suspended and replaced by the Tribal Trust Land Act in 1965. The Tribal Trust Land Act changed the name of Native Reserves to Communal Areas, and established Tribal Law Authorities to control Land policy in Communal Areas. The regulation and policy on land in Rhodesia was now handed over to the Ministry of Internal Affairs, which, in theory, recognized tribal law. The aim was to bind the chiefs even more closely to the State apparatus.

In reality, the Tribal Law Authorities proved helpless to enforce either farming methods or land allocation. The "freedom farming" of the 1950s continued and a new phenomenon arose, the "wanton destruction of trees", both in Communal Areas and on Commercial farms (Chitiyo, 2000: 72) It is argued here that this form of resource poaching fulfilled a genuine need. Trees were used for the construction of huts, for firewood/fuel and fences, but it was also clearly a protest against State law.

There was also an increase in land and boundary conflicts. The increased migrations of locals and foreigners into and out of kraals, villages, wards and districts and the ensuing confusion over land entitlements, added to the growing crisis in the Communal Areas. Various levels of boundary disputes, for instance between individuals and between villages, were commonplace and chiefs were often ignored or overruled by bureaucrats. The issue of land tenure security and inheritance were also problematic (Chitiyo, 2000). More Africans were moving to towns in search of jobs, while others worked on farms. Both the farm and urban dwellers still owned or wished to have access to land in rural areas. The tradition of polygamy and large families also added to land pressures. Yet the total quantity of African land had not increased, with the amount of good land diminishing.

Against this background, the Land Tenure Act was passed in 1969. The effect of which was to replace the Land Apportionment Act of 1930 and finally divide land 50% white and 50% black. This racial division of land was regardless of demographics. Whites made

up no more than 5% of the total population of the county. The veterans of the two World Wars and any white settlers were given prime farmland, whereas, despite their growing population, blacks were allocated low rainfall areas. This resulted in overcrowding, overstocking, serious environmental damage, low agricultural productivity and poverty in the communal areas, since one race group was not allowed to occupy land in the area of the other race group. It was in this context that Africans began to organize for political action around impoverishment issues and the land question.

The African urban worker knew that he was underpaid because he did not have land to return to. Equally aware were the unemployed who saw themselves being denied existence by a policy that forced them out of the rural areas and yet offered them no alternative source of income in the urban centres. The African farm workers also had the same land grievance. Most of them preferred to enter into labour contracts with landowners in return for a plot of land on which they could pursue a precarious existence. The African middle class, although they had the means to purchase land or start a business, were not allowed to own property in the designated European areas, nor were they allowed to open up businesses in towns which were designated as European areas. Undoubtedly, arable land and franchise became the popular themes of nationalist resistance movements and dominated the last years of colonial rule.

Conclusion

The key issues emerging from the analysis in this chapter are the following:

- From a historical perspective, there is little doubt that most of Zimbabwe's land and impoverishment problems are rooted in the racial land allocation policy of the early colonial government. The policy was not only racially skewed but also impractical. Little consideration was given to demography, population movements, climate, and soil types (except that the Europeans took the best of everything).

- The implementation of the policy of land segregation in Rhodesia had serious repercussions on African agriculture, which visibly declined soon after the creation of reserves and further deteriorated after the enactment of the Land Apportionment Act. The low productivity of the land, due to adverse ecological conditions, and to the shortage of space for both cultivation and grazing, which resulted in over-crowding and overstocking, were all factors which contributed to diminishing agricultural returns and the pauperization of the Africans. To an African population to whom land was traditionally the most important asset in its possession, the policy of land apportionment was clearly a source of hardship and much suffering.

- Furthermore, the failure to devise a successful and equitable land allocation policy compromised land utilization and set the scene for land conflicts among Africans and between Africans and Europeans. Africans were crowded into the Reserves, only to be gradually squeezed out of direct competition with Europeans. Their traditional methods of land utilization and animal husbandry were labelled as primitive and destructive. The State attempted to forcibly implement “correct” (European) agro-ecological measures, which resulted in passive resistance until the 1960s, followed by increasingly open and violent resistance.

- In 1965 traditional tenure was “restored” under the Tribal Trust Land Act. Tribal Land authorities were created, incorporating traditional leaders and operating under District Commissioners. The system operated until independence in 1980. The conflicting dynamics between State and peasants, and the agrarian dysfunctions were essentially about racism, the struggle for power and land allocation and usage.

- The majority of African communities is still settled on poor, badly located pieces of land and need consistent state support to enable them to derive livelihoods from agriculture and farming.

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African National Anthems: Normative Power, Land and Foreign Domination

Francis Onditi

Introduction

National Anthems, in *Kiswahili* language of East Africa, are referred to as *Nyimbo za Taifa*, the Shona people of Zimbabwe call them *Dzimbo dzeNyika* and among the Zulu people of South Africa they are referred to as *Namaculo Esizwe*. The importance of national anthems is not only found in their nomenclature, but also the role they play within the national socio-cultural development architecture. In this case, land is the connecting force between material culture and non-material culture that form part of the anthems' lyrics. In African socio-cultural landscape, national anthems are considered sacred as are liberation songs (Cusack, 2005). Most of them were composed by Africans during the struggle for independence, from colonialism, during the 1950s-1960s (Aluko, 1981; Babou, 2010). Some historians argue that the revolutionary propaganda declaimed during the Pan-African movement was later coined into *national anthems* (Meli, 1988; Allen, 2013).

National anthems provide philosophical foundations for promoting national identity for resisting foreign domination, including against contemporary foreign looting of land and other resources in Africa. In this way, national anthems signal and foster a country's independence from (neo-)colonial robbery and domination. Despite their strong symbolism and nationalistic ingenuity, national anthems have remained under-utilized in both academic and policy discourses-hence they are not fully applied in national development frameworks. Debates are abound on how to reconcile the positive elements of the national anthems with the antagonistic lyrics which some perceive. National anthems can promote values and norms for the full realization of 'African

potentials'-access to land, equality and capacity to defend the continent against (neo-)colonial imperialism or any form of domination-intellectual or material.

The idea of 'African Potentials' was first coined by the Centre for African Area Studies (CAAS) of Kyoto University in efforts to coordinate African scholars in addressing African development challenges in the 21st century (CAAS 2015). In this chapter, the concept of African potentials will on both material and non-material aspects of development. Land is not the only basis for production, but it is also a symbolic form of empowerment. During the colonial period land was the centre of tensions and conflicts around matters of African freedom from colonial dispossession and exploitation. Therefore, the discourse around African potentials aims at evaluating the wisdom and systems to deal with global and regional challenges hampering full decolonization of Africa. This process of decolonization takes various forms; promoting citizenship, as well as addressing issues such as social inequality, gender-sexuality and (neo-)colonial land dispossession.

Despite the national anthems' rich values, their 'normative power' has not been adequately exploited towards fulfilling the *African potentials*, including inventing technologies to optimize use of land resources as well as defending the land against any foreign invasions, such as the contemporary transnational corporations and foreign government land grabs in Africa. According to Bulhan (2015), land is a common denominator for both classical colonialism and neocolonialism. Some scholars have observed that neoclassical land grabbing in Africa has been accelerated by several endogenic and exogamic factors, among them; soaring global prices of commodities and the desire by foreign multinationals to 'discover' new fields of "investment", especially in the field of energy (Amanor 2017). In fact, while Africa is considered rich in land resources such as minerals and forest resources, fifty years after the independence of most African states, the African people still grapple with chronic impoverishment, inequalities, protracted conflicts, ignorance and politics of ethnicity (Oyugi, 1997; Noyoo, 2000; Santosh, 2010). The national anthems provide a symbolic sense of national unity and a sense of identity (Kyridis *et al.* 2009; Guibernau, 2004).

Critics elucidate that anthems, particularly those drawn from Africa, were circumstantial and that they are artistic productions, poetry or prose written during the colonial period (Ngara, 1986). In similar patterns of usage, they have also become part of celebrations during the quadrennial Olympic Games (Bornman, 2005). For example, in post-1994 South Africa, the momentous opening ceremony of the 1995 Rugby World Cup continued to shape the politics of the Southern African nation (Muller, 2001). The Kenyan national anthem, for example, vividly cites the role of home-land as source of heritage of splendour-implying the central role that land and its resources play in nation building.

Nevertheless, the *African potentials*-using land as a basis of development-remain treasured in the values and norms reflected in the national anthems. In what seems to be the renewal of the Pan-African movement, there is growing attention on the need to revitalize the notion of African ownership of their resources (Franke and Esmenjaud, 2010). This became more visible in May 2014 when the Agenda 2063 was inaugurated (African Union, 2014). As such, African leaders and ordinary citizens alike are learning to unite and speak with one voice on regional and global issues (African Union, 2014). This unity of the African people, which incidentally reflects the *African potentials*, draws breadth from some of the symbols of national anthems such as land and other natural resources. All these mirror the social capital of the African communities.

Indeed, sociologists have explicated that, national anthems are regarded as sacred, ritual and divinely inspired (Liao *et al*, 2012). For some countries, particularly those that have enjoyed long periods of peace and political stability, their national anthems symbolize supernatural beings and land in its totality (Corte and Edwards, 2008). Besides, it is also characteristic of most African national anthems as a source of heritage through material resources such as land. This social configuration has been found to promote cohesion and unity of purpose (Cerulo, 1993). This is because they remind citizens of their duty to the nation through symbols, such as, freedom, crest, or flag. For example, the 'green' colour on the Kenyan flag symbolizes *potential* agricultural productivity of the country and the 'white' colour symbolizes a peaceful nation.

In line with the notion of *African potentials*, Pan-African scholars have espoused the need to reflect on some of the indicators of past struggles (Jaravani, 2013), at the same time rejuvenate the debate on total liberation in all spheres of life - economic, political, intellectual (West, 2006). To this end, there is a growing need for intellectuals and policy makers to revisit and give light to the concept of *African potentials*, partly because the African heritage can only be utilized if there is a conscious move to revitalize the richness of African heritage (Smith, 2002), including the ability to defend 'land' from looting by some foreign governments and transnational corporations. It can be argued that common public cultures such as national anthems are not only recipes for peace and harmony, but also potential for catalysing conditions needed for utilization of land and natural resources for economic growth and equitable social development. Their normative richness could immensely contribute to social and political transformation, national cohesion and unity (Emeh, 2013; McWhorter, 2001; Borman, 2005: 385; Breed, 2009; Mazrui, 2003).

This chapter was born from a study on African 'national anthems' and their potential as 'normative power.' Jennifer Attide-Sterling's thematic network analysis of all the national anthems of the 55 African Union (AU) member states were analysed by organizing themes from basic, organizational to global/universal (Attide-Sterling, 2001), with the aim of understanding their 'hidden' meaning as it relates to the philosophy of *African potentials*-referring to both immaterial and materials resources such as land and its production utility. In order to identify patterns in the national anthems and their relevance to African reclamations of colonially looted resources, the chapter draws from Manners' work on 'normative power' (Manners, 2002). Given the immaterial nature of national anthems, this chapter focuses on normative power from an ideational lens. In this perspective, therefore, it is noted that norms are transmitted through ideas and institutions, as well as policies (Lenz, 2013).

The chapter proceeds in three sections. The next section utilizes the concept of 'normative power' as a framework to analyse the pattern of norms and values as produced by national anthems. The second details the patterns of norms and values among African

national anthems and their implications on elements identified by the AU's *Agenda 2063* as pillars for promoting development: 1) inclusive development and African land ownership; 2) nation-building and unity of purpose even during travails; 3) Pan-Africanism; and 4) harmony verse liberation struggle. The third and final section considers what this chapter calls the 'fit' for the *African potentials* and draws some conclusions towards exploring an effective mechanism for realizing the *African potentials*.

Conceptual Framework

In studies of international affairs, a 'normative agenda' lays out mechanisms and strategies for influencing other states within the global arena by setting international order as well as setting global agenda through foreign policy (Hall, 2017). Moreover, the values that it argues ought to inform the behaviour of states and other actors; the rules that it argues ought to govern the interactions between states and their citizens, non-governmental organizations, international institutions (Finnemore and Sikkink, 1998). In some instances, 'normative power' lays down the core values that would ensure a preferred way of life among its citizens (Hyde-Price, 2006).

The limitations of national anthems, as examples of 'normative power', include their inability to set the agenda for achieving these aims: an overarching strategy and a set of policies by which a state hopes to realize its preferred national, regional or international order. Despite these limitations, the normative power of a *national anthem* is widely acknowledged to have a salient normative agenda that seeks to promote certain values of a state. Through the diffusion of values, a state is able to realize its potentials across the development spectrum – ownership and control of land and other resources, peace, democratic governance, the rule of law, social justice and respect for human rights within states.

In view of this perspective, *national anthems* are considered as 'normative power' because, they try to implement national agenda mainly by non-coercive means-by contagion or unintentional diffusion by example; by intentional diffusion through strategic communications; by procedural diffusion through rules and modes

of interaction written into national or regional agreements; by overt diffusion by a state representatives in diplomatic or even political roles in target states, advocating particular modes of behaviour, rules or institutions. National anthems are also influential in the manner in which they target young school-going children in learning institutions, and by this approach they influence future leaders and encouraging cultural and African identity preservation which are crucial for reclaiming African tangible and intangible heritages. This is achieved in most African countries by ensuring that students in schools and middle-level colleges recite the national anthems regularly.

Historians and cultural studies scholars have attempted to link national symbols to nationalism and ethnic identities (Adams, 1995; Smith, 1991; Manners, 2002). In this chapter, we employed the concept of 'normative power' to understand how lyrics were produced in national anthems in various African contexts. The concept of 'normative power' has its roots both in the works of Anthony Smith and Ian Manners (Smith, 1991; Manners, 2002). It relates to the concept of ethno-symbolism developed by Smith, which espouses nation-building as a form of collective cultural identity (Smith, 2002).

The development of this theory was largely influenced by Smith's notion that *ethnie's* is a status precursor of nations, grounded on myths, memories, values, traditions and symbols (Smith, 1991; Heribert. 1995). However, critiques of Smith have faulted his emphasis on the 'legal rights and duties' of citizens as a sign of nationalism as being minimalistic (Guibernau, 2004). For instance, Smith fails to acknowledge that 'common legal rights and duties' do not necessarily define the common 'social values' that define a nation. It is possible to offer an account of a nation and nationalism without considering the legal or dutiful obligations of citizens, hence, the use of the concept 'normative power.' In this chapter, it is argued that norms conveyed by national anthems transcend material culture and legal obligations to develop a set of values that may influence citizens' behaviour towards a particular cause in life, such as nation-building and peacebuilding. Furthermore, such behaviour is largely influenced

by the power of values and norms generated by national symbols such as national anthems.

To this end, the institutional orientation of African anthems is a reflection of the social values embedded within the cultural confines of people. Thus, national anthems are regarded as sacred, ritualistic and divinely inspired (Liao *et al.*, 2012). The linkages between norms and the human ecosystem can also be considered from a cognitive point of view. When people think in dissimilar ways and are not willing to compromise at all, conflicts arise (Odunuga, 2013). This means that differences in individuals' opinions, values, understanding, expressions and thought processes lead to conflicts. As alluded to, by Plato, sometimes conflicts begin in the human minds; thus, rhythm and harmony that come with art-based peacebuilding strategies have the capacity to transform the soul. In other words, the common ground is nationalism's connection to *African potentials*. In this chapter, *African potentials* is defined as a community's or a nation's ability to build on existing cultural identities to achieve several things that are desirable to human society; 1) harmony; 2) liberty; 3) cultural cohesion; and 4) political unity and regional integration (Merdjanova, 2000; Bajaj, 2015; Mishra, 2015) and ownership and control of own resources.

Some scholars have argued that national anthems, similar to any other national symbol, galvanize citizens' *nationalism* (Bozos, 2004). They also strengthen a country's identity and people's allegiances and feelings of belonging to a nation and state (Brunn and Cottle, 1997). Many of these symbols and images provide the basis for nationalism, regionalism, irredentism, and potentially even later for separatism, devolution, inter-personal tensions (Liao *et al.* 2011; Voros *et. al.* 2012). National identity is not an innate quality in human beings; neither is it acquired naturally as one grows up. Like any other identity, national identity can be a powerful instrument in state building or tension. Thus, it forms a key pillar of conflict resolution processes such as peacebuilding, hence leading to realization of the *African potential* (Eriksen, 1993). This chapter examines how the normative power of national anthems influences national culture and policies based on cognition and identity. The creators of national anthems expected that the lyrics they produced would exert influence

on what they considered to be appropriate behaviour by citizens. In this chapter, two mechanisms are particularly important in the diffusion of norms (Manners, 2002).

The first is socialization (Manners, 2002). This chapter refers to national anthems' various forms of influence—'harmonious' narratives of 'human dignity' and 'peacebuilding' as well as 'negative' ones of 'bloodshed' and 'war.' The latter, however, more often play the role of spoilers to the *African potentials*. The means by which the lyrics of national anthems exert influence (both negative and positive) through normative power are similar to those by which they exert influence or power through state functions. For example, the solemn recitation of a national anthem by citizens in remembrance of a previous civil war or genocide serves to remind the nation of the importance of maintaining cohesion and peaceful coexistence. Socialization efforts occur through the institutional channels provided by the state or the country's history. The subtle differences lie in the fact that these paths merely serve as *channels* of diffusion by providing settings for socialization to occur; they do not guarantee peace or stability in themselves.

The second form of normative diffusion is emulation (Checkel, 2001; Meyer and Rowan, 1977). Learning the deeper meaning of a national anthem's lyrics can be a source of ideation for realizing the four elements of *African potentials*. In this case, national anthems ultimately exert cross-cultural influence by virtue of their historical record and attractiveness. As a result, the self-construction of national anthems as a successful public culture in nation-building takes pride in the place. Advocates of this course of normative diffusion observe that narratives are key sources of power (Nicolaidis and Howse, 2002). The functional orientation of national anthems is intertwined with their national identities or regional identification. Among African national anthems, the use of the phrase, 'God Bless Africa' across most of the countries' national anthems in Southern Africa, including Zimbabwe, Zambia and the Republic of South Africa, attest to this understanding. This form of normative power depicting certain similarities among African nations provides the basis for promoting development processes - regional political integration, African reclamation of colonially looted resources,

common trade and social cohesion. It has been observed that regional integration as a socio-economic objective is key to African unity (Nweke, 1987), hence, the path-way to full realization of the *African potentials*.

Although conceptualization and the performing of national anthems presents several opportunities for reclaiming African resources and for revamping the African peacebuilding architecture, there are challenges associated with the lack of a solid intellectual infrastructure on the continent. In an attempt to address these fundamental questions, we ‘scratch’ below the surface to establish more grey areas in framing the question of how an effective conceptual framework that reflects the African national anthems would look like (Gerald Nyangena, 2003:5). The weak academic infrastructure towards building what we refer to in this chapter as an *African intellectual architecture* (AIA) is partly to blame for lack of this framing and branding (Krztof Kubaki and Heather Skinner, 2006: 290). Mazrui, one of the celebrated African academic icons wrote, “a society without the will to create a sustainable university is a society without the will to maintain sustainable development (Mazrui, 2003: 136).” Behind it all is the whole tradition of intellectualism (Mama, 2007: 15), which essentially thrives on the platform of engagement in the realm of ideas and rational enquiry. Growth and development of African intellectual architecture has not escaped perennial development challenges.

Critics of ‘normative power’ as a tool for understanding influence of values and norms argue that the approach is not systematic and relies on value-judgement. For example, applying the musical power of national anthems presents a moderate mode of transforming conflicts and community of nations to peace. However, this approach has been faulted by music and peacebuilding scholars alike. Slachmuislder (2005) observes that in some cases peacebuilding activists extols the benefits of using music, particularly drumming, in peacebuilding. Slachmuislder, further, notes that the cultural and ethical dilemmas that can be implicated in using music are unresolved. For example, taking drums out of their context may negate their cultural importance; also their association with traditional masculinity may limit their usefulness since women are not

allowed to play drums in some African communities. On his part, Stuart Rees (2003) argues that the search for peace would benefit from seeking ideas from all sources, including music. For peace to be realized, attention should be paid to inclusiveness in such work. Moreover, power structures surrounding the state and music in action should be managed in order to advance human rights. Also positive transformation through music will require actors to radically subvert (neo-)colonial ownership of African resources such as land.

Challenges facing absorption of African intellectual assets such as those embedded within the lyrics of national anthems are not homogeneous across geographies. Transformation on the African continent will need to intimately deal with the (neo-)colonial dispossession of Africans (Urbain, 2008). But more important and necessary is the transformation of the Black world to take control of their own resources and destiny from the yoke of slavery, (neo)imperialism and intellectual hegemony (West, 2006). Scholars such as Jeffry Emeh narrowly and simplistically blame the African underdevelopment on bad governance and lack of visionary African leadership (Emeh, 2013). Similar concerns have been raised by other writers (Achebe, 1998; Nnadozie, 2006). On a more optimistic note, Emeh (2013) uncritically observes that experiences from advanced economies [which in fact are largely economies with foundations in the enslavement and colonisation of Africans] indicate that America and Asian tigers passed through similar historical experiences as Africa. Proper development for Africa can only occur when their leaders reject foreign domination by taking concrete steps through their visionary, resilient, selfless and charismatic leadership to reclaim their resources as well as claim compensation for enslavement and colonisation.

The central factor sustaining underdevelopment in most African countries is failure by the leadership to reclaim African resources, including land, from the jaws of resilient (neo-)imperialism (Olu-Adeyemi and Ayodele, 2007: 215; Oamen, 2011: 135). Academic and policy studies reveal that the continued application of western models of development, which neglect African imperatives of resource ownership and control, anchor gender inequalities and the impoverishment of Africans of various descriptions (UN Women,

2015; Joy Batsalelwang and Mbakas Dambe, 2015: 27). These are basically neo-liberal frameworks, falling short of critical considerations such as the African socio-cultural, economic, material and political realities.

But also, it is widely acknowledged that the absence of intellectual rigour in the political and macro-economic thought of many of the African development planners on the continent has perpetuated a vacuum for foreign thinkers to design and roll out development models for the African countries. Indeed, Husin (2011: 230) found out that many countries in Africa and Asia preferred applying “global development frameworks” such as the United Nation’s Millennium Development Goals (MDGs) in policy formulation as opposed to local African-based models of restitution and reclamation (Chukwuemeke, 2011: 110). Although the Sustainable Development Goals (SDGs) model is viewed as an improvement from MDGs, in its monitoring, the framing of its goals overly emphasize the need for countries to ‘box’ themselves within the chronicles of international ‘coordination’ and ‘collaboration.’ In light of the weak bargaining power by African states, that is reflected in lack of effective localization of the goals and a lack of consciousness of the rich African heritage espoused in national anthems (Stewart, 2015:285). In my considered view, the SDGs are simply another neoliberal frameworks far distant from the African socio-economic, political and cultural realities, for the simple reason, it slams the African Union Development Agenda 2063 (African Union, 2014).

In sum, the normative power of national symbols such as national anthems can be interpreted as ideational diffusion, which operates through socialization or emulation. The dilemma remains, how to reconcile the positive elements of the national anthem with the antagonistic lyrics they produce in order to promote values and norms for the full realization of the *African potentials*?

National Anthems: Social Values and Norms

In this chapter, national anthems serve several socio-economic, material, political and cultural functions. In this section, the chapter focuses on the linkages between national anthems and their

normative significance: 1) taxonomies; 2) Pan-Africanism; 3) Special form of music.

Taxonomies: National anthems depict a people's social, cultural and political history systems (Liao *et al*, 2012:115). Yet, other scholars elucidate that anthems, particularly those drawn from Africa were circumstantial and that they are artistic productions, poetry or prose written during colonial period (Ngara, 1986). This implies that they gained relevance during the height of the liberation struggles on the continent, reflecting the nationalists' political interests and ideological standpoints, to which these writers were a part. But, this could also suggest that the ideological concerns and class interests expressed in the national anthems were part and parcel of the African petty bourgeoisie. The outcome of this belief is that, it culminated into political emancipation of a few individuals with strong ethnic inclination, thus leading to ethnic politics we often witness on the continent.

Nevertheless, in line with Ngara's arguments, national anthems in Africa were formed as a direct reaction to colonialism and its effects, in a bid to and put away the complexes of the years of denigration and self-abasement that the process of colonization wrought. They were forms of art aimed at gaining back the confidence of Africans as a united African people. During colonialism until the time they started gaining their independence from colonial rule one by one, eight African countries used the South African composed 'God Bless Africa' as their national anthem, singing it both in English and in their countries' specific languages (Francis Meli, 1988). The aforementioned song, 'God Bless Africa' was composed in 1897 by Enoch Sontonga, a Xhosa minister at a Methodist mission school (Allen, 2013).

For decades during the apartheid regime it was considered by many to be the unofficial national anthem of South Africa, representing the suffering of the oppressed. Because of its connection to the ANC, the song was banned by the regime during the apartheid era (Allen, 2013). Despite this ban, the song became a pan-African liberation anthem and was later adopted as the national anthem of five countries in Africa including Zambia, Malawi, Tanzania, Namibia and Zimbabwe after independence. Zimbabwe

and Namibia have since adopted new national anthems, while the anthems of Tanzania, Malawi and Zambia still derive some lyrics from God Bless Africa. This song took “the form of the religion of the oppressed as well as the ideological expressions of the progressive tendencies of the anti-colonial resistance, and it is for these reasons that it was banned by the Apartheid government. The song was however continuously sung by those who were against apartheid at all their political and other related meetings. It later developed an adaptation uniting the people not only of South Africa, but also of other countries, signifying the political turmoil and the aspirations for freedom in other parts of Africa” (Allen, 2013). Thus the anthem grew from just a national song to a regional and somewhat continental anthem because Tanzania which belongs to another regional economic commission other than the SADC also adopted and later adapted the song.

The Tanzanian national anthem, for example, the phrase, ‘*Lord, Bless Africa*’, is basically a prayer for the creator to bless and uplift Africa, and is a special plea for the creator to listen to and enable the people obtain their daily needs such as food, security, and protection. Arguing for national anthems as a poetic genre, Emmanuel Ngara’s insight above raises the point that anthems are symbols of a shared history and political unity, with each writer from a specific country representing the shared interests of the political elite of that particular country which in turn were in resonance with the political ideas, interests and aspirations of the petty bourgeoisie on the whole continent. This argument finds weight in the fact that anthems of most African countries were drawn from this single source, “God Bless Africa,” noting the impact it had in uniting all African people towards a common goal and aspiration. In tandem with Ngara’s arguments, Curtis also posits that the history of Africa from its first contact with colonization to date adds insights to the associations that make anthems powerful in those roles (Curtis, 2010).

The spirituality of African anthems is a reflection of the social values within the African communities. In the western world, national anthems are considered royal and are mainly used to praise the monarch or royal dynasty. The oldest national anthem, defined as “a song, as of praise, devotion, or patriotism” is the Dutch national

anthem *Het Wilhelmus*, [in praise of the Dutch King or royalty] which was written between 1568 and 1572, but not then given any official status. *Het Wilhelmus* was declared the national anthem of the Netherlands in 1932 (Maarten Van Ginderachter, 2009: 60). Although on one hand some western scholars and civil society organisations uncritically demonise African leaders [including kings and chiefs] and national anthems as undemocratic, on the other hand anthems in praise of European Kings, Queens or royalty remain in use today. The first anthem to be officially proclaimed *La Marcha Real* was adopted by Spain in 1770 (Van Ginderachter, 2009). Across the world, national anthems are sacred and that they serve to remind citizens of their duty to the nation through motto, crest or flag (Cerulo, 1993: 245). The occasions upon which national anthems are required vary from country to country, but in the western world, they mainly serve to pay homage to a reigning monarch or head of state (Wolfgang Deutsch, 1955).

In Africa, anthems are sung during public holidays or when a national hero passes on. Their usability has been limited to public or state functions, but their potential in conflict resolution is profound. For example, the power of a national anthem to strengthen a nation's resolve was demonstrated during World War II when the British Broadcasting Corporation's (BBC) weekly broadcasts [from London] of the National Anthems of the Allied Powers attracted an audience of millions throughout Europe (Lioa *et al*, 2012). Most of the National Anthems, particularly those of African nations are sung in praise of freedom fighters, patriotism, and as such, the form and images of expression through them can reveal the character of a nation at the time when the words were constructed (Cusack, 2005).

Some countries, particularly those that have enjoyed long periods of peace and political stability, choose *national anthems* that dwell upon the natural environment, the nation's 'values, supernatural beings and land in its totality (Ugo Corte and Bob Edwards, 2008:8). Besides, it is also characteristics of most African national anthems to be built around a national hero. This social configuration is also practiced in the west (Camil Ungureanu, 2015). For example, the symbolism of some national anthems is profound-the Denmark's King Christian and Haiti's Jean-Jacques Dessalines, or around a nation's flag, like

those of Honduras and the USA. National Anthems are rarely noted for their musical quality any more than for their texts, though most countries have succeeded in finding a tune that is suitably dignified or stirring. Therefore, there has been a tendency for some countries to emulate their neighbours, with the result that the musical style of a National Anthem is often determined as much by geographical locality as well as the political circumstances leading to independence of such countries (Cerulo, 1993).

The African National Anthems project mixed African aspirations of emancipation; spiritualism; naturalism; and promises to the land of inheritance (Benett Hogg, 2004:215). In summation the African National Anthems were designed as part of the Pan African movement against external domination and its advocacy of self-centred development. Beginning as natural by-products of the struggle for African independence, some of the activities of the Pan African movement such as the National Anthems were subsequently shaped by the dynamics of the Cold War (Franke and Esmenjaud, 2008: 140). The idea of Pan-Africanism sought to unify and uplift both indigenous Africans and those of the African Diaspora as part of a global African community liberated from colonial enslavement. The agitation of African leaders placed primary value of the Pan African movement on the immediate national independence for the African territories (Tesema Taa, 2014: 65).

In times of war, music may play both constructive (consoling the victims of war) or destructive (attacks against real or perceived enemies) roles. The Balkans conflict was a typical show of this dichotomy (Hogg 2004: 223; Pettan 1998: 18) or in the Second World War (Joseph Moreno 1999: 4; Shirli Gilbert 2005: 177-178). Music has also been used as torture to torment and humiliate prisoners of war (Martin Cloonan and Bruce Johnson, 2002: 35; Cusack 2006). Songs have been used to encourage fighting in Rwanda and Sudan where the *bakkamah*, female praise singers from Darfur (Connick Carlisle 1973) have in recent years used their skills to encourage *jihad*. In November and December of 1929, through the “Aba Women’s riots,” the Igbo Nigerian women sang songs of frustrations against the British administration (John Orji, 2000). This marked the

emergence of the feminist movement in Nigeria - denoting identity of people seeking liberation from colonial oppression.

The trajectory of Pan-Africanism: The concept of Pan-Africanism can be likened to the national anthems through distinctive sets of ideas. While some of the ideals put forward the trajectory for development of the continent, others set the pace for political emancipation (Taa, 2014). This set was reinforced by the experiences of World War II where Africans fought alongside whites for the principles of [colonial] democracy and [colonial] national sovereignty. National Anthems of countries such as Zimbabwe reflect the country's political history with combative phrases such as "We praise our heroes' sacrifice," depicting the country's rage against external dispossession, exploitation and domination. Others such as Rwanda scorn colonial masters, encouraging the country's citizens to celebrate the fall of feudal bondage, 'colonialism has faded away like a worn-out shoe.'

The influence of Gandhi on the Pan-African movement constituted a third set of beliefs (it became particularly evident in Nkrumah's peaceful resistance to colonial rule) and that regional integration was seen to be a gateway to regional unity (Chingono and Nakan, 2009: 400). A fourth set identified by Andrain was Wilsonian idealism in international affairs and especially its emphasis of right over might. The Kenyan National Anthem for example, singles out the obligation of citizens to observe justice, 'Justice be our shield and defender.' The fifth set consisted of some of the ideas arising from Marxism and the Russian Revolution, most notably concepts such as the organization of the masses and the idea of being a vanguard movement is aptly mentioned in most African national anthems. For example, the third line of the first verse of the Ghanaian National Anthem reads, '*Bold to defend forever.*'

The development of African ideas became more pronounced from the conferences organized by the African leaders. For instance, following the Manchester Conference, the Pan-African movement became more consistent with national constituent parts as Kenyatta returned to Kenya (1946) and Nkrumah went back to Ghana, formerly the Gold Coast (1947), each to work towards the liberation of their country (Franke and Esmenjaud, 2008; West, 2015). Even

though not all independence movements of the continent necessarily subscribed to the underlying idea of 'African oneness', the ideologically-charged rhetoric of Pan-Africanism served them well by carrying the anti-colonial message and finally creating a feeling of self-assertion. At this point, most African countries began composing national anthems as a means of institutionalizing the political liberation ideology, but also as source of inspiration to citizens for the need to pursue self-independence, national and land sovereignty.

Special form of music: Music, in its intrinsic value presents a cultural dimension pregnant of ideas, beliefs and customs that are shared and accepted by people in a society (Lucy Ekwueme, Odunugu and Ogunrinade, 2013: 801). But, the intransitive ability of music to improve the quality of life has too often been under emphasized, particularly in learning institutions. Music transforms human experience; it brings joy and pleasure to men, women, and children in every society and culture. It brings solace in the ordinary activities of daily life. It represents one of the most basic instincts in human beings. Most important of all, music exalts human spirit and it enhances the quality of life. Deeper understanding of the role of music as a medium of learning reveal that it adds to the aesthetic quality of instruction, transmits cultural heritage and fosters creativity (Thomson and Ruthmann, 2013:4).

The function of music in society is directly linked to nation building and harmony (Ekwueme, Odunugu and Ogunrinade, 2013). In regard to this function, Ekwueme *et al* (2013) identify five attributes of music: 1) teach social education; 2) provide worthy recreation; 3) improve physical and mental health; 4) develop intellectual capabilities; and 5) to acquire and utilize musical skills. Similarly, Chitando (2000), observes that the historical value of music education is that it helps to pass the life of a society from generation to generation; teaching and learning of music education makes the students to be more tolerant and open, allows them to express themselves creatively, promotes individuality, and reinforces self-confidence; it also strengthens student problem-solving and critical thinking skills. In view of these functions, it is plausible to argue that national anthems as super forms of music can contribute to the creation of a culture of peace, this includes the ability to think

critically and to transcend national loyalties (Thomson and Ruthmann, 2013).

On a similar note, Goldblatt (2006: 25) reiterates that an education system that incorporates music, has the ability to cause national re-awakening, humanistic, aesthetic values and peace in the family, social life, national life and improved international image. National Anthems of most African countries embody concepts such as 'unity', 'peace' and 'justice,' these values that may encourage citizens or communities to know how to live together, appreciate cultural diversity (Cerulo, 1993). School-going children could benefit from education on the values, attitudes, modes of behaviour and ways of life to enable them to resolve any dispute peacefully and in a spirit of respect for human dignity and of tolerance and non-discrimination.

The humanistic and aesthetic nature of music brings sensitivity, humaneness, harmony, sweetness, purity, unselfishness, nobility into people's living (Faseun, 2005: 85). National Anthems, through their lyrics can be utilized to unify people during political events such as when reclaiming restitution of land and compensation for enslavement and colonisation. Groups opposing each other are likely to harmonize their views if a national anthem of the country is sung. When people's bodies are engaged simultaneously, emotions, and spirits, as well as their intellects, a harmonious condition is created. This is critical because rational processes alone cannot transform relationships of enmity or indifference into relationships of acknowledged interdependence, respect, common-purpose and trust (Cohen, 2005).

Through art and cultural work, one can learn not only the facts about one's adversary, but also how to listen to him, how to imagine her experiences, and how to express oneself so that the other can hear. The art surrounding music has the power to unify formerly torn apart communities. For example, Slachmuislder, (2006), while on a study mission in Burundi, South Africa and Democratic Republic of Congo (DRC) found out that [during periods of violence and in its aftermath] drumming supports people mentally, psychologically, and spiritually, and that it plays a unifying role. In fact, she found many instances in which Hutu and Tutsi drummers risked their lives to save

each other, preferring to emphasize their commonality as drummers instead of the ethnic identities that threatened to divide them. Although most of the national anthems are engraved within African ideologies associated with nationalism, they detest neocolonialism., Cusack (2006) found out that most of them are masculine focused on men, sons and brothers with only a few briefly acknowledging women as being part of the nation.

Functional orientation of national anthems is intertwined with their national identities. In a survey of hymns from national anthems of 18 states (Russia, Argentina, Austria, Mexico, Canada, Greece, Cuba, Bulgaria, Germany, Former Yugoslavia Republic of Macedonia (F.Y.R.O.M.), United Kingdom (U.K.), Serbia, Romania, Albania, Australia, U.S.A., France and Belgium) globally, Kyridis *et al.* (2009) found out that most of the national anthems had similar functions and that their wording provided the basis for national identity. For example, the national anthems of Bulgaria (55.56% of the statements), Austria (41.94% of the statements), Canada (38.46% of the statements), Australia (39.47% of the statements), Russia (33.3%) and Belgium (31.25%) substantially describe their “homeland” even as a notion or as a geographical area. On the other hand, the Argentinean anthem includes a plethora of “advisements” (45% of the statements) to the next generation of Argentineans, and so do the national anthems of the United Kingdom (76.19%), and Cuba (55.56%). Beneath these interesting findings, Kyridis *et al.* (2009) elucidate that there exist more dilemmas around the anthems and that further inquiry was required to address questions such as: How simple people conceptualize the use of national symbols? Which historical events led to the creation and adoption of specific symbols? Are there any similarities among the symbols adopted by “new” and “old” states? What about the multicultural states? Each ethnical minority has its own perception concerning the national symbols?

Significance of National Anthems to African Potentials

A thematic network analysis of lyrics produced by African *national anthems* highlighted both the harmony and tension as sources of

norms and values (Annex 1). The linkages of national anthems to *African potentials* should therefore be viewed from double-edged lens-constructive and reprisals norms. This section examines the pattern of normative power as produced by African national anthems along the four themes: 1) inclusive development and land; 2) nation-building; 3) Pan-Africanism; and 4) harmony verse liberation struggle.

First, in this study, African sustainable development and inclusion were perceived as a response to the need to own, control and preserve nature and the land, a phenomenon essential to African people and ingrained in their culture and traditions (Smith, 2009). Following a network analysis, among the fifty most frequently occurring concepts in African national anthems, were concepts denoting economic engagement which ranked relatively high across the five sub-regions. They included the following: people 19 (34.5%), land 29 (52.7%), labour 10 (18.2%), sun 9 (16.4%), and homeland 8 (14.5%) (See Annex 1). According to this *organizational theme*, the role of land as a factor of production was vividly reflected in African national anthems. This implied that anthems set the pace for the African economic order (See Annex 1).

Similar trends were observed across African sub-regions; in aggregate, the Southern African Development Community (SADC) sub-region had the highest (71.4%) frequency of the concept of land, followed by East African Community (EAC) (63.9%) and Economic Community of West African States (ECOWAS) (47.1%). In the Economic Community of Central African States (ECCAS), the concept of land appeared in two (28.6%) of the seven countries, and similarly in the Maghreb sub-region, the concept appeared in two (33.3%) countries of the total six in the sub-region. The concept of 'land', not only as a means of economic production, but also as a source of cultural prestige and a sign of territorial protectionism and sovereignty among African national anthems was prevalent. For instance, the Sudanese national anthem begins by pointing to the ownership of land by the people, '*We are the army of God and of our land.*'

The African economic order, as conceived by national anthems, portrays Africa as solely dependent on the forces of nature and fortunes of God. The concept of God appeared in 25 (45.5%) of the

total of 55 countries studied. The need to defend the land was considered to be an imperative stemming from the liberation struggle that led Africans to sacrifice their lives for independence. Other concepts related to the phenomenon of defending African land and featured in national anthems include the following: struggle 8 (14.5%), death 11 (20%), and bloodshed 12 (21%). Although these concepts also appeared in anthems of other African countries, they were mainly featured in anthems of countries such as South Sudan, Djibouti, Benin, Niger, Burkina Faso and Cape Verde. This association reiterated the finding that national anthems were not only sources of values for peacemaking but also sources of tension, hence, playing the role of socializing the citizens along the lines of liberation struggles, against any external aggression. The first stanza of Benin's national anthem obliges citizens to maintain their land, as it was obtained through bloodshed in vivid battles, *'Long ago, at their call, our ancestors, without weakness.'*

The second theme among the African national anthems revolves around nation-building. The basal and crude necessity for continued liberation, with all of its abrasive characteristics, reduced the trajectory of national anthems as sources of norms for peacebuilding and nation-building. However, the unifying function of national anthems was not, by any means, relegated exclusively to its emancipation functions. Overall unity, as a concept that denotes an *African potential*, occurred in 32 (58.2%) of the 55 African countries. Similar trends were observed among the national anthems across sub-regions: EAC 7 (63.3%); SADC 7 (50%); ECCAS 6 (85.7%); Economic ECOWAS 12 (70.6%) (See Annex 1). None of the national anthems among countries in the Maghreb sub-region contained the concept of unity or Africa. Nation-building was found to be included considerably more, as defined by other associated concepts such as peace 25 (45.5%), nation 21 (38.3%) and nation-building 12 (21.8%). Even among national anthems where liberation 17 (30.9%) and struggle 8 (14.5%) were considered cornerstones of nationalism, concepts such as love 15 (27.3%) and happiness 10 (18.2) as well as symbolic words such as flag 13 (23.6%) reflected a mood of reconciliation to the past injustices, hence symbolizing a continent that is committed to the ideals of *African potentials*.

The sanctity of African national anthems is reflected in several symbolic forms. For example, the first stanza of Zimbabwe's national anthem echoes the main theme of 'God Bless Africa' for Zimbabwe to be blessed and protected by the Creator from all foes. Although this is a sign that the country is concerned with national security, it could also symbolize the absence of peace clouded by 'fear' and the burden of responsibility to fulfil all that the African fore-fathers aspired during the liberation struggle. The same arguments apply to Mozambique's national anthem, in particular, the second line of the first stanza, reads, '*Heroic people who, in hand, toppled colonialism.*'

The theme of celebrating independence and African history's triumph over colonialism is rife in Mozambique's national anthem. Similar to the Zimbabwean anthem, references to the flag as a symbol of statehood and references to fighters who toppled colonialism are made. These verses celebrate the new socialist party and the triumph of Mozambique over colonialism, while exalting the ideology of the ruling party at the same time. This is the same as the verse in the Zambian anthem that also celebrates independence, while upholding the centrality of freedom of the people of Zambia. The first line of stanza one, reiterates the importance of freedom to the citizens of the country, '*Stand and sing of Zambia proud and free.*'

The current South African (SA) national anthem is a combination of 'God Bless Africa', *Morena Boloka*, which is the Sesotho version of 'God Bless Africa', *Die Stem Vie Suid Africa*, which was the national anthem from 1957-1994 and The Call of South Africa, the English version of *Die Stem Vie Suid Africa* (God Bless Africa was composed by Enoch Sontonga, a Methodist Mission school teacher in 1897). Before the South African elections in 1994, 'The Call of South Africa' was the official anthem of SA apartheid, while '*God Bless Africa*' was sung by the majority of the population at all anti-apartheid rallies and similar political gatherings. The two were merged into one official SA national anthem in October 1997. The national anthem employs 5 of the 11 officially spoken languages in SA, presenting SA as a multicultural society. The verse that is similar to that in the national anthems of Mozambique and Zambia is also about unity and freedom, referring to the country as 'our land' and the issue of land as national identity. The same is also true of Lesotho's national

anthem, which mentions peace and ancestors' land as a uniting force, as outlined in the fifth line of the second stanza, '*May you have peace.*'

Additionally, the use of symbolic terms such as children 10 (18.2%) and homeland 8 (14.5%) were found to be essential characteristics of an *African potentials*. In this sense, the functional aspects of emancipation discourse were abandoned in favour of less hostile but equally universal claims about African national anthems. As such, the following themes were conceptually constructed (See Annex 2): 1) National anthems are key symbols of national identity; 2) Nationalistic behaviour among leaders drives patriotism; 3) Effective regional integration reflects national policies on issues such as language and style of governance; 4) The type of education system in a country drives both collective and class conscience towards using national anthems; 5) Citizens have an intrinsic urge to be loyal to a state; 6) Consciousness about national anthems enables resistance to foreign dispossession and domination; 7) People of a country have value systems that promote cohesion.

Concepts such as 'negritude' and 'African personality' were theoretical and philosophical expressions of the general mood of *African potentials*. As part of this new social consciousness, some scholars believed that with independence a new ethos would be created, a new kingdom where Africans were free, proud of themselves and their culture, and respected by other nations (Curtis, 2010). Similarly, concepts are selected and ordered in a manner effective enough to bring the people of a nation together, and therefore, the 'sacredness' and historic ingenuity of national anthems are highlighted and emphasized (See Annex 2). For example, the first stanza of the Zimbabwean national anthem emphasizes lifting up the flag of the country against all foes as a symbol of proclaiming victory from colonialism. References to heroes of the liberation struggle also reinforce the same point that the formation of national anthems was indeed influenced by political issues and the need to celebrate the overthrow of colonial conquest on the continent.

Although the constructive functionalities of national anthems is evident among countries across the region, the impulses of normative power, as reflected in tone and rhythm, were seen to be controversial and therefore an immutable part of the human political struggle. And,

therefore, the forces against the *African potential* on the continent can also be traced from the African philosophy: a) “Ethnic” relations in Africa are complex and reflect community cohesion; and b) Fragile multicultural states have a tendency to relapse into conflict. The “ethnic” factor was clearly demonstrated in some of the national anthems. For example, Rwanda’s national anthem recognizes the three main “ethnic” groups, perhaps in order of superiority, as seen in line 4 of the third stanza, *‘Together we have decreed it-Tutsi, Twa, Hutu, with other racial elements.’*

Thirdly, the study established Pan-Africanism as a concept in national anthems and form of intellectual resistance to neocolonialism, characterized by terminology such as ‘Africa’, ‘neighbours’ and ‘patriotism’. However, this was not strongly reflected in the manner in which terms that defined Pan-Africa such as ‘Africa’ were featured in the national anthems. For example, in EAC, the term ‘Africa’ only appeared in 2 (18.2%) countries, in SADC, 3 (21.4%) countries, and in ECOWAS, 4 (23.5%) countries. In the same vein, none of the countries in the ECCAS and Maghreb sub-region contained the term *‘Africa’*. Collectively, the term appeared in 9 (16.6%) of the 55 African states under study. Pan-Africanism was believed to represent positivism and hope to the African people. For example, on one hand, the first stanza of the Tanzanian national anthem states, “God Bless Africa,” and the last line of the last stanza of the Ugandan anthem states, *‘The Pearl of Africa’s Crown.’* These two represent a hopeful Africa. On the other hand, the Central Africa Republic’s (CAR) first stanza crowns African people in solidarity as having the same origin. However, it obliges people to remain vigilant to resist any form of tyranny, from both within and outside, the national anthem cautions its citizen to remain vigilant against any force that might threaten their rights and unity, the fourth line of the first stanza, summarizes this rage, *‘But, from today, breaking tyranny’s hold.’*

In this sense, therefore, African national anthems were conceptualized less as norms to serve a constructive development function, but more as a liberation phenomenon. In Southern African countries, the use of terms such as ‘strive for freedom’, ‘liberation’ and ‘struggle’ are shared among countries such as Angola, South

Africa, Mozambique, Zambia and Zimbabwe. In particular, the Angolan national anthem highlights the importance of liberation voices as demonstrated in line one of the first stanza, *‘O Fatherland, we shall never forget, the heroes of the fourth of February.’*

Finally, while there exist several aspects of harmony, such as the case of Congo, Brazzaville and Gabon, other countries in the same geographical area maintain a liberation mood. For example, the second to last line of the last stanza in the Chadian anthem warns the populace of the need to remain vigilant in preserving their freedom, *“Your freedom will be born of your courage.”* Inter-regional similarities in the conceptualization of anthems are evident across the continent. For instance, the same themes of peace and protecting the nation from enemies also exist in anthems from Malawi, Kenya, Tanzania, Gambia and Nigeria. For Nigeria, the emphasis on the three pillars (freedom, peace and unity) of nationalism appears prominently in the first stanza, *“One nation bound in freedom, peace and unity.”*

A similar motif also exists in the Angolan national anthem with references to the heroes who died for independence and the need to honour the people’s history. The second line of the first stanza says, *“The heroes of the fourth of February.”* It goes on to recognize the brevity and sacrifice of the freedom fighters for the attainment of the country’s independence. As such, the fourth line of the first stanza says, *“...Who died for our independence.”* Likewise, Swaziland’s national anthem implores the creator to establish and fortify them, *‘Establish and fortify us, Lord Eternal.’* On the other hand, Niger’s 5th line of the 3rd stanza radicalizes the populace to rise against any intruder by symbolically referring to such enemies as *‘animals.’* The Maghreb sub-region seems to project more dichotomy than harmony in the conceptualization of its national anthems. The Algerian anthem is more assertive on protecting the nation against any form of external invasion, with the first stanza that asserts, *‘we swear by the lightning that destroys.’*

Policy Implications: The ‘Fit’ Mechanisms

In this chapter, although the results showed that the lyrics produced by African national anthems point to the detachment of

African countries from any form of external domination (intellectual or material), in the end, the discourse invariably returned to the oppression of citizens of such countries (see Annex 3 on how the norms were constructed along the organizational and global themes). Hence there is need for a 'fit' mechanism within this dichotomy of *constructs*. Dichotomies among national anthems make the simple isolation of their concepts even more complex to do for building a framework for *African potentials*. In view of these normative dichotomies, this chapter identifies three 'fit' mechanisms for framing the norms and values of a national anthem within the rubric of the *African potentials*.

First, it is imperative that coded concepts are conceptually linked to long-term development goals of which the broader thinking of *African potential* strategies becomes a part. This is especially so because change management scholars have reiterated that unleashing *potential* - either as an individual or group or state can be a helpful tool for developing solutions to complex social phenomenon facing development in Africa (Walinga, 2008; Carr, 2000).

Secondly, if the *African potentials* as an African philosophy is well articulated within the context of national symbols, in this case national anthems, policymakers and development strategists should be able to comfortably predict the development agenda and results for the continent without relying on, sometimes remote global frameworks that do not 'fit' into the African context.

The third 'fit for purpose' is informed by the fact that the national anthems are largely heterogeneous in various aspects - spatial, cultural, conceptualization and aspiration. Furthermore their normative power is influenced by various factors - geopolitics, how much such countries are capable of challenging global frameworks and the loyalty of citizens to interact with such values and norms in various socialization medium-schools, religious institutions, and national functions. Thus, their application to promoting the ideals of *African potentials* can be effective if applied case-by-case considering these contextual and philosophical differences.

Fourth, this study revealed that norms and values produced by national anthems present both harmony and tension in the evolution of African society. And that this pattern of norms and values has

implications on the ideals of *African potentials*. In this diverse conceptualization, on one hand, *African potentials* are represented as a harmonious process depicted by the need to maintain unity and peace in the African land, with a recognition of the significant role played by-God and ancestors. On the other hand, tension was reflected as a disjunction between the African emancipation (freedom, liberation, bloodshed, death and continued struggle) and an economic order that is controlled by superstition.

Conclusion

This study revealed that norms and values produced by national anthems present both harmony and tension in the evolution of African society. And that this pattern of norms and values has implications on the ideals of *African potentials*. In this diverse conceptualization, on one hand, *African potentials* are represented as a harmonious process depicted by the need to maintain unity and peace in the African land, with recognition of the significant role played by God and ancestors. On the other hand, tension was reflected as a disjunction between the African emancipation (freedom, liberation, bloodshed, death and continued struggle) and ii) an economic order that is controlled by superstition. Thus, the central tension is that while the African national anthems destine Africa to the enslavement of the past and fierce resistance against any form of western dispossession and domination, the elements of *African potentials* such as unity, peace, god/divine, human dignity and land as a source of food, sovereignty and prosperity present opportunities for self-reliance in several aspects, including the intellectual ability to conceptualize and operationalize development processes. However, on the mere basis of this thematic network analysis of norms produced by national anthems, it is difficult to elaborate on how the proposed 'fit' mechanism of intervention based on the ideals of *Africa potentials* should look like. Thus, further research is required to discover the intrinsic value of national anthems as lived social objects and their potential contribution towards building development momentum as well as playing antagonistic role within the African development architecture.

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Annex 1: Quantitative Analysis Regional Economic Communities

Thematic Categories	EAC	SADC	ECCAS	ECOWAS	MAGHREB	AFRICA
Unity	7 (63.3%)	7 (50%)	6 (85.71%)	12 (70.58%)	0 (0%)	32 (58.18%)
Africa	2 (18.18%)	3 (21.42%)	0 (0%)	4 (23.52%)	0 (0%)	9 (16.36%)
People	4 (36.36%)	3 (21.42%)	2 (28.57%)	8 (47.05%)	2 (33.33%)	19 (34.54%)
Peace	7 (63.3%)	5 (35.71%)	2 (28.57%)	10 (58.82%)	1 (16.66%)	25 (45.45%)
Nation	5 (45.45%)	6 (42.85%)	4 (57.14%)	5 (29.41%)	1 (16.66%)	21 (38.28%)

Nation- building	0 (0%)	2 (14.28%)	1 (14.28%)	8 (47.05%)	1 (16.66%)	12 (21.81%)
Freedom	6 (54.54%)	8 (57.14%)	5 (71.42%)	9 (52.94%)	2 (33.33%)	30 (54.54%)

Donors, Politics and the Question of Post-Colonial Land Restitution in Zimbabwe

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Kahuni*

Introduction

Land restitution in Southern Africa has attracted much attention from the international “community” as it is embedded in (neo-)colonial history of racial dispossession and segregation. Its intrusion into the present has a bearing on donor-government relations especially regarding restoration of land to Black Zimbabweans. The donors have tended to emphasise the need to respect the (neo-)imperial rule of law, which in fact translates to the rule of (neo-)empire. As will be noted in the foregoing, (neo-)empire has tried to block recent land reclamation and restitution in Zimbabwe. Empire has relentlessly tried to force African governments to adhere and commit to neo-colonial law and parameters for land redistribution. Proponents of market-based land reforms namely, the World Bank, International Monetary Fund, some Non-Governmental Organisations and others grudgingly acknowledge that land restitution is a necessity in Southern Africa. They have however maintained that land restitution must be firmly entrenched within the [imperial] rule of law which is incidentally the rule of empire. The International “Community” emphasizes that the existing land problems, ownership and redistribution must not be “racialised” and yet land inevitably takes a race-based spatial character everywhere in the world, including Euro-America where Black Africans are not allowed to own land. Most institutions and international conventions have legal requirements for expropriation and limitations to government authority to expropriate land. Zimbabwe as a member of the international “community” is subject to international standards but the challenge is that the international standards are often

designed by dominant Western countries and institutions with financial and economic power to impose sanctions on African countries that refuse to comply with what they often feel is unfair and unjust. Helliker (2006: 127-30) notes that land reform involves three components, that is, land redistribution, land restitution and land tenure. However land tenure gives access to land and deals with the social organisation of production and under market led reform it may be done at the expense of redistribution. Agrarian reform relates to capitalist penetration in rural areas whilst land restitution is all about reclaiming stolen land. Land has to be given back to Blacks who were victims of land looting by the Whites: restitution goes beyond mere land redistribution.

The Fast Track Land Reform Programme and restitution in Zimbabwe is a reflection of historic land inequalities, including dispossession of Africans, which dispossession was committed by agents and beneficiaries of colonialism (Melber, 2002: 2). It is in this context that President Mugabe has revitalised the experiences of Zimbabwe as a victim of (neo-)colonial injustices and has thus maintained that; “Zimbabwe will never be a colony again.” Zimbabwe has continued to be regarded by some countries as a rogue state and donor countries have blamed Harare for Zimbabwe’s continued economic decline. While the demonic songs about the decline of Zimbabwe erroneously presuppose that the economy was performing well for every Zimbabwean, the pre-reclamation economy was good only for the selected few enjoying colonial privileges, including the White commercial farmers. For the majority of peasants crammed in sandy soiled and poorly watered communal areas, life had never been easy since the establishment of these colonial reserves [now called communal areas] for Africans. Donors have maintained that other SADC member states must not follow the Zimbabwean land reclamations which they blame for Zimbabwe’s plunge into being a basket case that can no longer afford to feed itself. However, there is evidence that much of the food in postcolonial Zimbabwe was produced by communal farmers and especially since the economic structural adjustment programmes in the 1990s, commercial farmers have focused increasingly on producing non-food crops for the international market. This chapter

explores how land reforms and restitution have unfolded. Given that ordinarily governments have the prerogative to restitute land in accordance to their own Constitutions and laws, the central question is: Under what conditions are governments likely to embark on land restitution within the rule of law? Why has “the law of the land” and the need for political justice in Zimbabwe been used to largely legitimise forceful, coercive actions that have worsened relations between the government and donors. The chapter also seeks to examine why the land question became political and thus directly challenging to the resilient empire.

Land ownership in Zimbabwe has been affected and complicated by its colonial history since it was from the onset embedded in forceful acquisition, settlement and resource exploitation that was enjoyed by the white settler minority. As will be noted in the foregoing such skewed land ownership that was detrimental to Blacks in the then Southern Rhodesia was protected *inter alia* through pieces of legislation such as the 1930 Land Apportionment Act and the land clause in the 1979 Lancaster House Constitution that disadvantaged the majority Black population. Professor P.L.O. Lumumba observed that Kwame Nkrumah had warned in 1963 but a few had listened to him. Nkrumah had warned that: “It has taken us long to discover that the struggle against colonialism does not end with the attainment of national independence. Independence is a prelude to a new and more informed struggle for the right to conduct our economic and social affairs” (Lumumba, 2011: 9).

During the first decade of the 21st century Zimbabwe hit headlines as ‘Mugabe’s Zimbabweans “uncivilly” grabbed White commercial farms; “the struggle between Black land “invaders” and White commercial farmers were played out on TV screens internationally...Stark contrasts were presented between violent nationalism and sovereignty, democratic freedom, the rule of law and development” (Scoones, 2010: 1). Susan Booysen (2002:2) connotes that given the highly emotive nature of land dispossession and ownership in settler colonies this has been directly challenged in Zimbabwe through land “seizures” espoused through discourses of Pan-Africanism, anti-colonialism and neo-colonialism. It must be pointed out that inasmuch as land is important to Africans, it was

also the cornerstone of the colonial governments' development policy (Melber, 2000: 36). This explains why colonialism was all about land dispossession:-this was also why colonial laws were enacted and became the bedrock of property ownership and protection that were skewed in the interests of Africa's erstwhile colonizers. It is because of such historic injustices that the land problem still exists and why the Southern African region under the aegis of SADC has not yet been able to come up with uniform legislations to deal with and redress this problem. The land problem is one of the historical problems that were carried forward from the past, a deficit that has been supported by empire through neo-colonialism. The continuation of practices of dispossession, structural violence and domination, after independence, by former colonial powers and their descendants have been continued under the guise of globalisation. Empire has thus supported the entrenchment and upholding of "decolonial" power transfers that were in essence 'bargained' controlled change which was meant to uphold colonial type property rights that guaranteed continuity of imperial economic requirements (Herbst, 1990:42). It is therefore not surprising that the Zimbabwe Lancaster House agreement made certain that there would be a "legalised" continuity of colonial land and property rights that were guaranteed in the new constitution albeit safeguarding the rights of the minority settler community; the status was maintained because that is what empire is for.

Land acquisition, dispossession and retention in the hands of the White settler minority was "a geo-political construct and concept", a reflection of the historical and socio-economic forces that almost succeeded in moulding some countries in Southern Africa into White dominions similar to Australia, Canada and New Zealand (Mandaza, 1999:135). Settler colonialism had to be protected by empire hence the historic compromises reached during decolonisation were determined by the interests of White settler colonialism on one hand and its Cold War imperatives on the other. It was in this context that the newly independent African governments had to abide with rules and regulations of international capital. According to Ibbo Mandaza (1999:137) these constitutions "constitute the virtual guarantee- especially through the Bill of Rights for economic continuity in the

maintenance of the old social relations of production, and even a “formal blessing” of property ownership established under White settler colonialism.” In Zimbabwe, the interests of Whites were land and minerals and these interests were protected and consolidated by imperial legislation. Laws were the vehicle for perpetuating racially biased land ownership that continued after independence. North *et al* (1989) posit that constitutions are essential in controlling governments to respect and enforce rules, they are ‘difficult to change’ hence they are not easily manipulated by those in power. However these constitutions were designed to preserve the integrity of the colonial settler state, what they regarded as a positive legacy that was an outgrowth of settler colonialism. Post-colonial settler states like Zimbabwe were thus obliged and committed to respecting imperial property rights and were not expected by empire to renege on such commitments. Spivak correctly observed that “the mainstream has never run clean, perhaps never can” (Buchanan and Pahuja, 2004:73). In this he meant that empire has always maintained a watchful gaze over former colonies through international economic institutions including the Commonwealth from which Zimbabwe pulled out at the height of the land reclamations.

Thus, domestic political institutions and politics in developing societies are determined by empire in that leaders in former settler states are constrained to abide with a set of rules so that they do not behave “irresponsibly.” Imperial laws are thus ‘checks’ imposed on leaders in former settler states to behave according to empire’s dictates. Imperial international law is unduly given prominence and therefore expected to eclipse national sovereignty and national law in post-colonial settler states. It is thus important to briefly explain what “empire” is and how it operates. Such information is very vital in that it provides the much needed analytical framework that we employ in analysing why there were stronger temptations for the ZANU-PF led government to abandon (neo-colonial)-law governed land restitution. It also explains why the radical land reform and restitution ‘overtook the (neo-) colonial legal processes.’ We also explain why the donor “community” was not willing to support land restitution in Zimbabwe.

Passavant and Dean (2004) in their book “Empire,” claim that empire is a new form of legal imperialism that is “decentred and deterritorializing” because it is not constrained by borders. As “the postmodern form of sovereignty in empire is said to have surpassed the modern form that inhered in territorial nation states, government and politics come to be completely integrated into the system of transnational command” (Buchanan and Pahuja 2004:75). It is in this context that proponents of globalization contend that globalization is irresistible and nation-states that try to resist, do that at their own peril. International financial institutions like the World Bank (WB) and International Monetary Fund (IMF) and other multilateral institutions play a pivotal role in maintaining “empire,” a global order, with mechanisms that are unidirectional and positivist conception of the relationship between law, states, and markets.”(Buchanan and Pahuja, 2004: 73). Bonnie Campbell in the 1997 WB Development Report says “the World Bank now occupies, among the multi-and bilateral institutions, the central place as a producer of new normative frameworks in social and political spheres. These norms become the “rules of the game” that are put forward as having universal validity” (Buchanan and Pahuja, 2004: 78). As will be noted, Zimbabwe was expected by the West to fruitlessly continue on a market-based land reform dictated by WB, the IMF and other donors under the aegis of empire. In Zimbabwe, a dual economy survived relatively undisturbed during the transition to independence. The dual economy was made up of an agricultural economy consisting of a large scale intensive sector that produced commodities for both internal and external markets. The small scale agricultural sector mainly produced food crops for domestic consumption.¹Large scale commercial farming in Zimbabwe was favoured by the highly inequitable land and agricultural opportunities created under colonialism. This unequal land ownership continued after independence and prime land had continued to lay in the hands of the White minority until the commencement of the “Fast Track Land Reform” (FTLR).

The White minority was unsympathetic to the plight of the landless Black majority. They were unwilling to part with land that had been stolen by colonial settlers from Blacks. The situation was

further exacerbated by external donors who emphasized on “good governance” as a prerequisite of obtaining funds for land reform programmes. The problem in this was that they did not insist on good governance also on the part of Tony Blair who refused to honour the British commitments to fund land redistribution—was this good governance on the part of Blair? Donors contended that land reform must be based on both equity and efficiency on political and economic grounds. Questions arise whether the prominence of international law mean that national sovereignty and national law must be eclipsed by imperial international law? As already pointed out empire’s machinations were successfully challenged through land seizures and land restitution in Zimbabwe. Notably, colonial forceful looting of land at the advent of colonialism has been used as a strong political argument by ZANU-PF politicians to justify radical land redistribution and restitution to Blacks. Contrary to the ideological argument is the economic viewpoint by donors. Donors tried to ‘arm-twist’ the Zimbabwean government by arguing that land reclamations by Black Zimbabweans would lead to loss of “investor” confidence, shortage of foreign exchange earnings as well as impacting negatively on national food security. To their dismay the ZANU-PF led government soldiered on because they knew that many of the so-called investors are in fact fronts for (neo-)imperialism. Below we give an overview of how laws were used during colonialism and after independence to shield the White settler minority until 2000 when this was challenged and overtaken by events. As will be noted reclamations were a means to dismantle restraints inherited at independence were the status quo had been left intact no matter how unequal and unsustainable.

According to empire, land reclamation in Zimbabwe was unconstitutional because it did not abide to imperial international law. They maintain that Africans involved in land reclaiming must respect the imperial rule of law and colonial property rights and this is a requirement by the donor community. This ended up straining relations between donors and the Zimbabwean government that decided not to adhere to donor dictates. Empire, thus, had a bearing on donor-government relations with regard to land reform and restitution in Zimbabwe.

A Historical Overview of Land Expropriation in Zimbabwe

Zimbabwe was colonised by the British South Africa Company in 1890. Upon realisation that there were no abundant mineral resources as anticipated, the settlers shifted their interests from mining to agriculture. The Ndebele and the Shona were forcefully evicted from their land and pushed into reserves that were dry or arid areas with poor rainfall patterns: the Ndebele equated these reserves to cemeteries.¹ The Land Apportionment Act of 1930 divided land on racial grounds. According to Robin Palmer the Act set aside 51 per cent of prime land in Southern Rhodesia to less than 3000 white farmers whilst about 85 000 African families were forced into already overcrowded reserves (Palmer, 1977: 132). In 1950 the Land Husbandry Act was passed. Africans in reserves were forced to reduce the number of cattle that they owned. The Blacks resented these laws which legalised outright theft of their property by Whites. To worsen the situation, unequal land ownership between Blacks and Whites were accompanied by growing overpopulation, landlessness, land degradation and growing poverty in reserves whilst there were large tracts of unoccupied land reserved for Whites that were not being utilised. The land issue was therefore one of the grievances that led to the liberation war that was executed by ZAPU and ZANU from the 1960s to 1979. The Lancaster House Conference that ended the Rhodesian civil war was not able to resolve the land problem. Below we discuss how the conference dealt with the land problem.

The 1979 Lancaster House Agreement was a compromise by warring parties and its major achievement was that it brought warring factions to the negotiating table. The 'invisible hand of empire,' was seen in the independence constitution that was drafted by the British. The British mediators at the conference were from the outset geared at securing an agreement that was conciliatory and beneficial to the minority Whites in Zimbabwe-Rhodesia given that the land issue was the most difficult issue to deal with (Steadman, 1991: 42). As already noted looting of land by the Rhodesian White settlers at the behest of successive White governments was meant to guarantee on the one hand the economic domination by Whites and on the other hand the impoverishment of Blacks. This was a way to force Blacks to provide

labour to the White settler community. It is therefore not surprising that the Thatcher government deliberately drafted a constitution that favoured the minority White farmers. Joshua Nkomo and Robert Mugabe (leaders of the Patriotic Front) categorically stated that the acute land hunger in Zimbabwe was not supposed to be taken for granted (Herbst 1992: 131). However the Patriotic Front leaders were coerced to agree to the provisions of Lancaster House agreement by Lord Carrington and the Frontline States leaders, Samora Machel of Mozambique, Kenneth Kaunda of Zambia and Julius Nyerere of Tanzania. The Lancaster House Agreement Paper No. 19 stipulated that:

Every person will be protected from having his property compulsorily acquired, except when acquisition is in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of that, or other property in such a manner as to promote the public benefit or in the case of underutilised land, settlement of land for agricultural purposes. When property is wanted for one of these purposes, its acquisition will be lawful only on condition that the law provides for the prompt payment of adequate compensation and where acquisition is contested, that a court order be obtained. A person whose property is so acquired will be guaranteed the right to access to the High Court to determine the amount of compensation. Compensation paid in respect of loss of land to anyone who is a citizen or ordinarily resident in Zimbabwe (or to a company the majority of whose shareholders are such persons) will within a reasonable time, be remittable to any country outside Zimbabwe, free from any deduction, tax or charge in respect of its remission. The Constitution, will on the same basis as in other Declaration of Rights, make clear that a number of transactions which might be considered to involve an element of compulsory acquisition will not be so regarded for the purposes of the Declaration of Rights (Stiff, 2000: 258).

Land was therefore to be purchased on a “willing seller, willing buyer basis.” This was the Lancaster House Constitution that the new post-independence Zimbabwean government would be forced to adhere to. The constitution was made up in such a way that it

contained certain entrenched provisions which ensured that some policies would not be tampered with until a certain time framework had elapsed, thus, the post-colonial Zimbabwean government was bound by “sunset clauses” in the Lancaster House Constitution that protected the White commercial farmers (Manby and Miller, 2002: 6).

Zimbabwe 1980-1990

If yesterday I fought you as an enemy, today you have become a friend with the same national interest, loyalty, rights and duties as myself....We must draw a line through the past to achieve reconciliation....Oppression and racism must never find scope in our social and political system. An evil remains an evil whether practised by white against black or black against white (Meredith, 2002: 15).

Emerging from an intense armed struggle, Zimbabwean nationalist Black politicians sought a pragmatic way forward that even the racist leader of the Rhodesian Front party, Ian Smith who had regarded Mugabe as an “apostle of Satan” could not help but regard him as an icon. The new Zimbabwean Premier, Mugabe called for a cessation of all hostilities between Blacks and Whites as evidenced by Mugabe’s speech quoted above. As already pointed out, the adopted 1979 Lancaster House Constitution retained and protected the colonial existing land patterns. Oblivious of empire’s new legal imperialist shenanigans the Mugabe government agreed to be bound to the stipulations of the agreement and as such they acquiesced not to compulsorily acquire land but to promptly pay adequate compensation for any property that would be acquired and this would be observed until amendments would be made to the land clause after ten years. The White commercial farmers, supporters of Ian Smith’s Rhodesian Front party, were given a lifeline; they were given favourable treatment which they enjoyed. Dr Bernard Chidzero assured both the Zimbabwean White population and the international community that the government would strictly respect colonial property rights. In an interview he said,

We have a constitution that guarantees property rights. It is watertight as any constitution you can ever imagine. We can therefore

not expropriate or nationalise without compensation, and if we do, it requires changing the constitution and it is not very easy to change the constitution. We accepted the constitution and we live by it. Therefore we respect property rights (Herbst, 1992: 136).

The ZANU-PF government tried to redress the land imbalances but failed to reach the targets they had anticipated. Donors had pledged more than US\$1, 8 million to assist in land purchases, resettlement and developmental programmes. The World Bank contributed about a quarter of this amount, though promises of about 636 million pounds were made by the British government. These were simply pledges that never materialised—a case of phantom aid. The government had projected to settle about 162 000 families by 1985 but because of lack of financial bailouts the government lagged behind. The land resettlement and restitution was painfully slow. Initially the British government gave 44 million pounds that was far from being adequate. The British said that the government was being very ambitious to purport that they would resettle about 162 000 families by 1985 as this entailed buying about 9 million hectares of land that required an amount of about \$Z570 million.¹ In 1985 the Zimbabwean government passed the Land Acquisition Act that gave them the right to identify and buy land that was not in use. Jonathan Moyo noted that from 1980 to 1990, the government to a certain extent succeeded in steering a course that benefited peasants, aspiring Black entrepreneurs and White farmers.¹ Paradoxically, by 1990 only 52, 000 peasant families had been resettled, a number far below the anticipated 162 000 families that had been the government target for 1985. It is logical to briefly do an academic excursion on why the government failed to resettle the anticipated families and how this in turn impacted on donor-government relations.

It is beyond dispute that one of the reasons for the failure of government to give back land to the Zimbabwean peasants was the Lancaster House Constitution. The constitution was a handicap to government efforts to resettle peasants for this was limited to buying poor quality land that White commercial farmers were willing to dispose (Sachikonye, 2004: 5.) He correctly noted that even if the government had been committed to a comprehensive ‘restitution’

programme the amount of money that was needed was far more than the government could afford especially given that the donors simply made pledges that never materialised. The situation was further worsened by the donors who were not prepared to unconditionally finance a land restitution programme outside the “willing buyer-willing seller” provision. Commercial farmers did not avail prime land for purchase while the donors did not provide the much needed financial bail-out. Though the 162 000 resettlement figure was considered by donors as unrealistic and unsustainable the Mugabe government considered it unfair to shoulder the burden of paying for land stolen from their forefathers. Tension between donors and the Zimbabwean government became apparent in the late 1990s when significant political pressure was exerted on government technocrats and politicians by land hungry peasants to give back land to the indigenous Black population.

The Zimbabwean State and Empire

The Zimbabwean government legally absolved itself from the constraints of the Lancaster House Constitution in 1990. The government now had the chance to change the Lancaster House land clause that had hindered them from not only redistributing land but restoring it to its original Black owners. The ZANU-PF led government hastened to enact a land legislation that would legally empower it to vigorously reclaim land and give it to the Black people. In December 1990, amidst jubilation and singing, parliamentarians passed the Land Act. The government now had the right to take any land that they needed for resettlement purposes, it also had the power to fix the price it would pay. President Robert Mugabe said:

Our view in the party and government is that nothing must stand in our way to the acquisition of any land we identify and designate for resettlement. Whilst we concede the principle of fair and reasonable compensation, we cannot brook any contentious arguments or disputes in court on the subject (Meredith, 2002: 18).

The 1990 land law was greatly appreciated by the peasants and some Black politicians given that unsanctioned peasants occupations were periodically taking place in the 1980s. This was as Sam Moyo observed, because “the land reform policy, especially since 1984, had produced outcomes which were inequitable, undemocratic, inefficient and unsustainable.” To the government, the land law was the much needed breakthrough to set things right, little did they know that they were now travelling a water-logged political path in which they would collide head-on with empire. The land Act eroded the security that had cushioned the White commercial farmers since independence. Chief Justices Antony Gubbay and Enock Dumbutshena said that for the ‘first time’ colonial property rights were in jeopardy. The World Bank, the IMF and other bilateral donors said that the new legislation would scare away Western “investors” (Allen, 1999:7) The then Minister of Land, Agriculture and Rural Development told White Commercial farmers that the issue of land was not negotiable and the government could only entertain resettlement programme modalities (Meredith, 2002: 123). The 1992 Land Acquisition Act gave the government power to target land being underutilised, commercial farmers with more than one farm and land owned by absentee land lords. Zimbabwe’s confrontation with empire over colonial property rights was inevitable since empire was in support of and actively creating impediments that vitiated land redistribution and restitution. In defence of empire, an assessment made by the United Kingdom think tanks claimed that Zimbabwe did not have the administrative capacity and ability to implement a sustainable land reform (Palmer, 2000: 2). The Commercial Farmers Union (CFU) argued that the government had to first resettle peasants on government land that was unproductive including Black elite farms that lay idle. They also posited that the government should form a land board that would arbitrate and establish precisely, land to be bought for resettlement. President Mugabe maintained that the government would take land compulsorily. White farmers challenged the legality of the land seizures as they argued that they were being stripped of their right to [colonial] property that they alleged was being given to senior government officials. Margaret Dongo, the president of the

Zimbabwe Union for Democrats publicised a list of 413 farms, amounting to about 457 428 hectares parcelled out to ZANU-PF senior officials. By February 2000 about 2706 farms had been gazetted for compulsory expropriation.

The liberation war unfinished business had to be completed with land being given to its rightful owners. At first there were disagreements amongst politicians with some politicians like the then Home Affairs Minister Dumiso Dabengwa, saying that the land “invasions” were unlawful. Of course he did recognise properly that the Zimbabweans were not invading land but were in fact reclaiming their land. Mr Paddington Garwe, a High Court Judge declared farm “invasions” illegal but more farms were “invaded.” The United States of America (USA) said that they were not prepared to finance land reform in a country that was now saturated with violence, lawlessness and without regard of colonial property rights and respect of the imperial rule of law. In all this, the “donors” including the USA failed to notice that it was in fact the absence of restoration of land to Black Zimbabweans that perpetuated insidious structural violence. Their focus was sadly merely on visible violence of the moment and not on abiding structural violence resulting from centuries old colonial dispossession of African (Nhemachena, 2016). The IMF and the WB and other donors also did the same. President Mugabe responded by using presidential powers and amended the Land Acquisition Act. The Rural Land Occupiers (Protection from Eviction) Bill became law and under this Act, a farmer who ignored the three months eviction notice would be imprisoned. President Mugabe sanctioned land reclamations, redistribution and restitution thereby directly challenging empire. He shrewdly asked where the law was when the members of the “Pioneer Column” forcefully evicted Blacks from their land. The Rhodesians had further legalised the illegal by the already mentioned Land Apportionment and Animal Husbandry Acts. David Blair commenting on this submitted that, “Ghosts of the pioneers justified an act of plunder; he was choosing to take his moral standards from Cecil Rhodes. What was good enough for the greatest robber baron of the nineteenth century was apparently good enough for Mugabe,” (Blair, 2002: 180). Not to be outdone, Britain, the USA and later the European Union, imposed sanctions on Harare for

having dared to go against empire. Paradoxically the same USA, Britain and the European Union are involved in contemporary grabbing of African land, from peasants, in the context of the ongoing 21st century second scramble for Africa.

Empire had always seen to it that land restitution would not take place in Zimbabwe, first through the Lancaster House constraints, then through structural adjustment programmes and now through sanctions. Through the various land conferences during the first two decades of independence, land hungry peasants were indirectly being told to wait, synonymous to being told “it will never happen.” David Husluk, the then director of the Zimbabwe White Farmers Commercial Union blamed Tony Blair’s government for failing to recognise the colonial wrongs over land acquisition during colonial rule. He maintained that the British were responsible for Mugabe’s abandonment of a rule-governed land reclamation and restitution, thus, Mugabe took the land issue out of the imperial legal institution and made it a party issue. In fact customary African laws demanded restitution of what was stolen-it was not just a party issue but there were conflict of laws here-the imperial laws prevented reclamation and restitution while African customary laws and dictates of Ubuntu provided that reclamation and restitution were necessary. In this sense, imperial claims about lawlessness of the process was just a complaint that the process was against empire not that it was against all laws and lawfulness because customary law inspired by Ubuntu provided for that. Clare Short’s (the British International Development Minister) letter to Minister Kumbirai Kangai precipitated President Mugabe’s conviction that empire wanted to maintain the status quo explaining why the donor community wanted him to be stampeded out of office in the looming 2002 presidential elections. He skilfully situated land restitution in his campaign discourse by shrewdly defending the land invasions as a continuing struggle against empire. He astutely argued:

This land, this Zimbabwe, is a sacred inheritance from our forefathers; it was the casus-belli of our armed national liberation struggle. It cannot, therefore that: we have to beg a foreign power for and we say: hands off Britain....We are not Europeans. We have not asked for an inch of Europe, any square inch of that territory, so Blair

keep your England and let me keep my Zimbabwe (Phimster, 2004: 385-400).

Mugabe categorically stated that he would not allow himself to be taken to court by a settler. Farmers whose farms were designated were not allowed to sell or lease property, neither were they to approach the court nor appeal to an impartial board but the minister. President Mugabe reiterated that his government would not entertain any ideas of legality or constitutionality, he said, “Forget what the constitution says. If it does not indicate that we take the land, then it will be changed” (Peron, 2000: 10). Empire could not brook this, as noted by Hardt and Negri the state had to conform to the dictates of international law for they contend that because of globalisation, “the juridical sovereignty of the nation is superseded by a supranational one in which international organizations play a significant part,” (Buchanan & Pahuja, 2004: 85). To defend land restitution judges who were sympathetic to the White commercial farmers who, during the colonial era, had benefitted from land theft had to pave way to judges who supported the land revolution. It was in this context that Chief Justice Antony Gubbay was advised by the war veterans to resign and Chief Justice Godfrey Chidyausiku was promoted to the bench. By 2005 the Zimbabwean government could boast that land had finally been given to its rightful owners. Moyo and Yeros (2005 b) observed that the land occupation movement in Zimbabwe is the most notable of rural movements in the world today, a major challenge by an African state to empire that is promoting neo-imperialism through globalisation.

Moyo and Yeros (2005 b: 188) wittingly observed that the land issue needed radical nationalist solutions. Land restitution was, thus, a “matter of sovereign right, pride and reparation rather than a mere matter of poverty alleviation” (Helliker, 2006: 195). In 2008 William Michael Campbell led 78 White commercial farmers to the SADC Tribunal which was said to have given a ‘landmark ruling’ in favour of Whites. The ruling was that the White farmers “can keep their farms because the land reform undermined the rule of law.” The Zimbabwean government scoffed at this ruling. Chief Justice Chidyausiku legalised the restitution of land to Zimbabweans thus he concluded, “The most satisfying thing to me is the role that I played

in the Land reform programme. Some people believe that the judiciary was not independent because some of the judgements were perceived to be in favour of government. But the real reason is I belong to that generation that fought for the country. And that is what really impressed my perception, not that I wanted to please anybody.” Chidyausiku thus allowed Zimbabwean Blacks, sons of the soil to repossess land from those who had stolen it in the twentieth century.

Conclusion

This chapter set to reflect on Land restitution in Zimbabwe that attracted attention from the international community. It is a struggle embedded in the colonial history of racial segregation. The Zimbabwean government had no option but to challenge empire thus the government sanctioned land invasions because it was a political issue that would later be legalised by national laws. Zimbabwe has successfully given back land to its original owners despite the spirited efforts by opponents of the Zimbabwe land restitution exercise. Capitulation would translate to endorsing rule by empire, a detrimental decision that would perpetually impoverish the Zimbabwean people. Proponents of market-based land reforms namely, the World Bank, International Monetary Fund, Non-Governmental Organisations and empire were bent on wanting to frustrate Zimbabwe land restitution process. What transpired in Zimbabwe shows that though empire might try to bully some states, the state is still very important for it is the one that has overall authority with regard to what happens within its territory. This is why the Zimbabwean state refused to abide with the ruling of the SADC tribunal that wanted to reverse land reform and restitution in Zimbabwe.

¹ Most of the information contained in this Chapter is extracted from my Master’s thesis: *External Donors, Domestic Political Institutions and Post-Colonial Land Reform: A Comparison of Zimbabwe and Namibia*. University of the Witwatersrand, South Africa, 2005

² Much of the grain sent to the Grain Marketing Board soon after independence was actually produced by Black communal farmers who even at some point out-competed White settler farmers in agriculture.

³ For more information see, T.O. Ranger, *The Past and Present in Zimbabwe*

⁴ The amount needed was quite an amount given that the Zimbabwean dollar was still very strong compared to the United States of America and British currencies. Britain had given Zimbabwe 44million pounds whilst the USA pledged US\$225 over a three year period. For more information see Herbst, in Baynham (ed), "Transition," (1992: 134, Peter Stiff, 289).

⁵ The advantage of the land policies that were adopted by the Zimbabwean government entailed that they upheld property rights whilst at the same time would continue to attract aid from donors. J. Moyo, "State Politics and Social Domination in Zimbabwe," *Journal of Modern African Studies*, Vol. 30, No. 2, (1999: 329).

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Sovereignty in the Era of Transnational Corporations' Land Grabs: Interrogating Travesties and Reversals in 21st Century Africa

Oliver Mtapuri & Artwell Nhemachena

Introduction

Struggles for liberation, by African states, were in pursuit of the attainment of their independence and national sovereignty. Sovereignty is important in the exercise of the supreme power and authority of the state over its citizens, its tangible and intangible resources. Sovereignty is indivisible, inalienable and is expressive of the independence and essence of a nation. While land grabs are not a new phenomenon, the scale, the intensity and pace in recent land grabs present new problematics related to national, land and food sovereignty. Without sovereignty over their land and other resources, the African nations and their citizens cannot conceivably exercise sovereignty over what they eat or consume, and so they risk ending up eating contentious genetically modified foods that are rejected even in the Western countries. The problematics are tantamount to travesties of justices. The travesties of justice manifest in injustices in realms of politics, economics, resource ownership and control and so on; particularly as Africans are losing their land and livelihoods through transnational corporations' land grabs in Africa. Because African wars of liberation were waged to reclaim the land that was looted during colonialism, land grabs are therefore effectively reversing the aims of the African struggles against colonial dispossession; they are effecting the opposite – evictions and dispossession - representing reversals of indigenous Africans' land reclamations.

Land grabs are not a new phenomenon, they have been overtly and covertly happening since the beginning of colonialism. Many

indigenous people in developing countries – the marginalised - have been subjected to land grabs for many centuries, at times they were intimidated into abandoning their land or forcibly kicked out using force (National Association of Professional Environmentalists [NAPE], 2012; Moyana, 1984; Palmer, 1977). The contemporary face of land grabbing has seen transnational corporations and foreign governments seizing African land and blatantly dispossessing and robbing African people. NAPE (2012:5) notes that these processes have a negative impact on dispossessed Africans because they are being robbed of their sources of livelihood, especially the means to feed themselves and to support their social and economic development. In many instances, the dispossession of Africans has been associated not only with the destruction of traditional African structures, but also the violation of their human rights. This Chapter examines land grabs on the African continent, with a focus on the mechanisms, logics and technologies used to effect these grabs and their debilitating impacts.

Land grabs occur where land that previously belonged to Africans is seized by corporate firms or governments (NAPE, 2012). This is supported by Siciliano (2013:333) who argues that the term land grabbing refers to the dispossession of Africans by foreign states and by transnational corporations. In our parlance, land grabbing is the callous and forceful dispossession meted on Africans. ‘Grab’ insinuates force which is the source of the ongoing structural and systemic violence of dispossession by the transnational corporations and foreign governments. Land grabbing represents new forms of imperialism orchestrated by transnational corporations and foreign governments.

Typically, land is grabbed, by transnational corporations and foreign governments, for growing commodity crops to be exported and sold at overseas markets, including for bio-/agro-fuels (Hofman and Ho, 2012; Borras *et al.*, 2012). However these transnational corporations proceed to evade paying taxes to African governments (Nhemachena and Dhakwa, 2017). NAPE (2012:5) points out that land grabbing occurs for several reasons: firstly they occur for purposes of clearing land for tree plantations (for carbon offsets); secondly the land grabs occur for purposes of establishing mines and

thirdly for purposes of speculation with land prices. Commercial interests, as well as foreign exigencies of setting up a New World Order with Euro-American full-spectrum dominance over the planet, are at the heart of land grabs which denude local communities of their real and sovereign wealth and heritage – their land. In fact this agenda for the Euro-American New World Order and full spectrum dominance over the planet is being propped up by academics who are arguing that in the emergent world, there is no inside and no outside, no foreigner and no local. White *et al* (2010) also added that other than for agricultural production purposes, land grabbing can also be done for other forms of extraction on scale including mining, and to make sure that transnational corporations' access to these resources is assured. Because these grabs are done by foreign companies as well as foreign governments, the term 'foreignization' of space or land has gained currency and is often used to refer to land grabbing (World Bank, 2010 cited in Siciliano, 2013). As such, the consequences of land grabs include dispossession of Africans – subjection to subaltern status, landlessness and hopelessness. In cause-effect relationships, land grabs are also at the core of the widening inequalities and deepening impoverishment through displacement. Displacement is a violation of a human right to place and identity.

Land grabbing is commonly accompanied by massive displacements of local populations to pave way for 'development' initiatives such as infrastructure projects, food exports and biofuel production or for extraction of natural resources especially minerals (Siciliano, 2013). Foreign land grabs have been analysed by such authors as Borras *et al.* (2012). Land grabs destroy livelihoods and they also displace the dispossessed Africans by relegating them to the status of landless citizens or shadows of these (neo-)colonial "masters". This chapter argues that land grabs are an abomination and atrocity as they lead to violent dispossession of Africans, including their forced removals with little or no compensation. They strip people of their heritages, their self-worth, self-esteem, self-determination and the sovereignty of the self as well as the sovereignty of the African states.

Land grabs results in Africans' loss of ownership and control of their land. Africans should be able to own and control their land within the confines of their cultural, legal, political, economic and social norms. Viewed from the perspective of the dispossessed Africans, indigenous people's reclamation or repossession of their land should be acceptable on all grounds - moral, social, economic, political including psychological. The process and outcome must result in equitable justice – social, political, economic and cultural.

History of Land Grabbing in Africa

Alden-Wily (2012) argues that contemporary land grabs are not new: in this respect he notes the dispossession of native populations in North America and also the three African land rushes of 1885-1915, 1919-1939, and 1945-1955. White *et al* (2012:623) posit that 'in many regions of the global south, land was first grabbed by pre-colonial rulers in territorial wars with each other, then by colonial governments and increasingly by foreign or domestic corporations.' However, this narrative from White *et al* (ibid) is an attempt to absolve empire, White supremacists and colonialists of all responsibility for the wrongs meted on Black people. These are attempts to justify their own robbery by purporting that the history of land grabs dates to precolonial eras; the intention of the authors cited here is to erroneously present imperial land grabs as nothing untoward. In fact other Western inclined scholars misleadingly describe the transnational corporations and foreign governments as "investors" and their land grabbing, dispossession or robbery of African land is also misleadingly described as land "deals".

The introduction of the slave trade saw many Africans unwillingly abandoning their land as they fled to seek refuge in places located far away from the slave trade routes and this land was never recovered (Lovejoy cited in Ojo, 2015). The decoys used included the colonial redefinition of space. While western spaces are addressed as either private or public, African ones are addressed as communities, commons and so forth. When westerners colonised Africans, they denied the existence of the public and private spheres, choosing as they did to foreground and emphasise communality and commons

which underwrote the neo-colonial land grabs even today as Africa continues to be regarded as [global] common and communities with unowned spaces *res nullius*, *terra nullius* and so forth. Therefore, the so-called “unclaimed” lands imply that they are up for grabs in a free-for-all atmosphere.

Thompson (2011) also gave the example of the land grabbing activities by Dutch settlers in present day Western Cape, South Africa, well before the advent of colonialism in Africa. He notes that although the Dutch settlers initially established friendly relations with the indigenous people (the San) and were involved in fair trading, exchanging European-made products for sheep and cattle. However, with time they developed violent tendencies towards the San. Using violence as their tool, they dispossessed the San of their land, livestock, food and minerals and even captured some to enslave them. Thompson, (2011) argues that they expanded their territories through attacks on the local population, defeating them and dispossessing them of their land, sometimes taming them as their own property or banishing them to areas of poor soils and climatic conditions that were unsuitable for crop and livestock production. Blakeley (2009) also echoed similar views noting that Europeans used various forms of coercion to acquire territories and establish their own empires. Expansion of empire was a core facet of colonial policy to perpetuate their influence and acquire more resources by *fiat*, hook or crook including enslavement. Violence, deceit and dispossession were hallmarks of early pre-colonial land grabs which resulted in loss of livelihood assets and made it almost impossible to recover. That the indigenous people survived, is a testament to their own resilience.

The partition and resultant scramble for African colonies by European powers in the 1890s marked a new wave of land grabbing, albeit on a larger scale than ever seen before with equal ferocity. European powers such as Britain, France, Germany and Belgium occupied and took over large territories which today exist as independent African states during the land rushes around 1885 (Alden-Wily, 2012). Local leadership lost control of their empires and authority over land and land resources were illegally taken over by the new colonial administration taking advantage of some legal manipulations. This literally meant the indigenous people lost their

human rights to land ownership and were resettled to new areas on “state” land, rendering them landless (Alden-Wily, 2012). The land which was grabbed illegally was “legalised” through the laws enacted by the colonial and imperial robbers, - in everyday parlance – the robber or the thief bringing to finality the dispossession by theft of the indigenous people of their resources. Africans had shared the vast resources they had among themselves, including land. For them, being landless was un-African because their lives and livelihoods revolved around the land which was readily available. Their land was their life, hence the notion of the son/daughter of the soil. When Africans reclaim their land, they are not necessarily *grabbing* [as is often erroneously claimed] it but *reclaiming* it. Therefore the question is why on one hand Africans are derogatorily portrayed [by Western media, “civil” society organisations and Western states] as ‘invading’ or ‘grabbing’ their African land yet Westerners are never conceived as grabbing or invading their own Western land? In fact even when they grab indigenous African lands, transnational corporations and foreign governments are often misleadingly portrayed as investors rather than as invaders.

During this period, many white entrepreneurs went on to grab huge tracts of land for private land ownership. They targeted well-watered fertile soils in rich climatic regions where agricultural production was likely to be high and lucrative, as well as mineral rich lands. Citing South Africa as one of the many examples, Nunn (2007) noted that by 1925, about 90% of its land was already grabbed and in the hands of European settlers. Black Africans were pushed to areas of poor soils, where farming was not a lucrative venture and some were even pushed to areas prone to natural disasters; droughts, flooding and areas which were disease infested, where they stayed in overcrowded conditions, paying land tax to the colonial administration. White *et al* (2012:623) note that ‘through the nineteenth century, outright sale by colonial powers of large tracts of land held under customary tenure was quite common.’ In short, colonisation of the African continent was a giant step towards dispossession of locals of their land and consolidating European control over African lands.

White *et al* (2012) observe that upon independence, most Black African governments supported by lobby civil society groups pushed to redress the land ownership anomaly created by White land grabbing during the colonial era. This was done either by means of “land reforms” or either dismantling large private or corporate estates and redistributing them to smallholders in either radical reformist measures meant to buy political loyalty from the rural poor or as part of nationalist projects of indigenisation by newly independent post-colonial states. Interestingly, radical ‘land reforms’ are labelled ‘land grabs’ by Western governments. Nyandoro (2012) notes that Zimbabwe’s ‘fast track land redistribution’ in the early 2000s was largely painted as unlawful and amounting to unfair dispossessions in the eyes of the West. van der Ploeg (2008) and White *et al.* (2012) observe that there is some reversal of pro-poor policies as governments and international development organisations support ‘land deals’ with transnational corporations and foreign governments. This re-emergence of land grabs in their current forms is anti-development and against the pro-poor development policies and programmes. Indeed, policies and programmes that marginalise and dispossess local communities are not development. In place of development, some scholars are now calling for a postdevelopment era as well as sharing economies in which emphasis for Africans is supposed to shift from ownership of means of production to merely received charity or welfare from the criminally minded global transnational corporations.

Amanor (2012) argues that conditions which pave way for this re-emergence are partly because of structural adjustment and neo-liberal reforms foisted on developing countries in the 1980s and 1990s, which promoted ‘market-driven’ economies and privatisation of state-owned land and enterprises. Examined more closely, the so-called [African] market-driven economies are in fact [intensively] (neo-)colonially driven economies suffering the invisible hand of the resilient empire. Alden-Wily (2012) investigated and discovered that “legal” manipulations are one of the most common key instruments which facilitate present day land-grabbing. It is these legal manipulations that classify as “un-owned”, traditionally owned and controlled lands Pieces of international legislation that disempower

Africans are not good for the state and the indigenous African people. Legislation must empower African people for self-reliance and self-determination-which include sovereignty of the land – land sovereignty. Borrowing from food sovereignty theory, people must have the right to own and control their land and define related policies in tandem with related socio-economic, environmental and cultural contexts to ensure the sustainability of their livelihoods. It is an enabler for Africans to take ownership and control of their land for purposes of ensuring the judicious production, distribution and consumption of crops and to correct historical patterns of land dispossession. Land sovereignty is about ownership, control, access, availability and sustainable utilisation of land by Africans for the benefit of Africans. Further, land sovereignty challenges land grabs on moral, economic, legal and political justices.

Hall (2011) notes that there are different institutional arrangements through which most of contemporary land grabs are structured, which are generally a hybrid of historical precedents, and some contemporary incarnations. She identified various models. The first is the extraction model which is largely concerned with dispossessing [African] people and stripping them of natural resources, as is the case of mining and timber harvesting. This model was used in Sierra Leone where hundreds of families were dispossessed and displaced from their homes to allow transnational mining to take place at Tongolili mine (Human Rights Watch, 2014). Secondly, the enclave model which involves the total dispossession and takeover of land and related resources, the displacement of people and some infrastructural development to facilitate “commercial operations”, and to provide inputs and outputs of a “commercial venture”, which in fact is a robbery venture. Thirdly, the colonist model where commercial farmers dispossess or rob Africans of a block or area, as happened to former White farmers [who migrated to Mozambique] who formerly occupied farms that have recently been reclaimed by Blacks in Zimbabwe (Ariyo and Mortimore, 2011). This model is like the former settler colonies, where colonial administrations dispossessed Africans and parcelled out large pieces of land to European farmers, reminiscent of colonial occupation. Fourthly, is an out-grower model which dispossesses

[Africans] and then establishes-processing facilities ‘as a way of incorporating small scale producers into value chains’. Thus, all the models still underscore elements of robbery and dispossession. The production and reproduction of the impoverishment of Africans, including inequalities, thrives under such conditions of dispossession, robbery and suppression.

Causes, Mechanisms and Technologies of Land Grabbing

Land grabbing in its contemporary context, in developing countries, has been executed using many mechanisms. White *et al* (2012), drawing insights from Wolford (2010) and Safransky and Wolford (2011), identify several causes and mechanisms behind the sharp rise in demand for large-scale land and resource “deals” which in turn lead to accumulation through land dispossession. Some of these mechanisms and technologies are just a duplication of those historically used by colonial governments while others ‘involve new configurations of old relations’ (White *et al*, 2012:627). Different mechanisms have often resulted in different forms of dispossession with equally variegated impacts on affected Africans, as discussed below.

Firstly, is the much-anticipated global food shortages which in turn has prompted huge dispossessions in the guise of ‘investments’ in food crops (human food and livestock feeds) by corporates (Godfray *et al.* 2010). Besides shortages, the rapidly changing nature of diet of fast growing countries like China and India has been argued to have led to major changes on the type, quantity and quality of food crops to be produced and how they are produced. However, it is necessary to note that the nature of consumption in the world is increasingly being determined by transnational corporations with branches in various states in the world. Responding to this alleged impending crisis and changing demands for food, many land deals have been sealed in Latin America and these have seen expansion of land meant for soya production in an alleged attempt to curb “future food shortages”. In the same vein, nations which wholly rely on food importation such as the Gulf States and South Korea were of the view that they should not rely entirely on the market to source for

their food but should rather dispossess peasants in other states so as to secure direct control of off-shore land and food production. NAPE (2012:11) notes that “Europe’s consumption levels far exceed the continent’s capacity, relying heavily on imported resources from the rest of the world” and hence the need to dispossess people of their land in overseas territories.

There is, however, a different perception of the purported food shortages. The Transnational Institute (2013: 6) dismisses the scarcity arguments as mere myths which ‘oversimplify complex realities’ noting that food-scarcity arguments advocating large scale agricultural production ‘fail to acknowledge that there is already more than enough food in the system to feed everyone, and that food security is undermined by costs, loss of harvests, waste and the diversion of land to production of non-food industrial products’. Examples of such non-food production projects include fuel (agro fuel), fibre, flowers and industrial tree plantations for rubber, timber and pulp. However, if available land is used for food production, there will be no fears of food insecurity or scarcity. As earlier alluded to, the returns to ‘capital investments’ are the over-riding factors in these new escapades and adventures. Profit and quick returns to ‘investment’ are the major reasons for the current surge in new land grabs resulting in cases of accumulation through land dispossession in which the indigenous Africans are the victims while transnational corporations are the robbers.

Secondly, White *et al.* (2012) posit the fear of rising, and volatile, fuel prices. Borras, McMichael and Scoones (2010) single out biofuel projects as a response to the envisaged impending global energy crisis. This is supported by growing desire by the industrialised economies to cut dependence on oil supply from the Middle-Eastern region. Moreover, biofuels are the new ‘profitability frontier for agribusiness and energy sectors beset with declining productivity and/or rising costs’ (Borras *et al.*, 2010: 576). Biofuels are providing the new frontier to make profit for transnational corporations given the fluctuating prices of oil and the rising costs of extraction of fossil fuels such as coal and gas. Biofuels are renewable, sustainable and most importantly are harvested; this explains the dispossession of Africans whose land is being grabbed in the hostile and thuggish encounters

with transnational corporations and foreign governments. The land grabs are hostile to the extent that they are undoing the *raison d'être* of the African struggles to reclaim African land which was stolen during the colonial period.

One of the factors accounting for the current dispossession of Africans, as identified by White *et al* (2012), is the purported 'new environmental realities' and related technologies which have promoted the so called 'green grabbing' (Vidal, 2008). The contentious Kyoto Protocol gave the developed countries the green light to establish offsets for their carbon emissions through purchasing carbon credits from projects in the developing regions through the Clean Development Mechanism (NAPE, 2012; Fairhead, Leach and Scoones, 2012). As a result, many other African nations including Uganda, have seen an influx of firms which include the United Kingdom-based New Forests Company, the Busoga Forestry Company Limited, Forests Absorbing Carbon Dioxide Emission Foundation; Green Seat among others looting land for this purpose (NAPE, 2012). This environmental tool has become an instrumental mechanism in promoting the dispossession of indigenous people (Moore, 2011). This neo-liberalization of the environment has seen the formation of new non-governmental organizations negotiating the conditions governing the carbon cap and trade programs known as REDD initiatives (Reducing Emissions from Deforestation and Degradation) (Carmody and Taylor, 2016). This development has led large NGOs like World Land Trust and WildLands, among others, loot huge tracts of the so-called 'empty or un-owned' land globally in what Fairhead *et al.* (2012) see as advancing the long legacy of colonial and neo-colonial resource dispossession, camouflaged as environmental management. This gave birth to forest reserves, national parks and other interventions directed at reducing the purported environmental degradation caused by local indigenous people. The involvement of NGOs in land grabs raises questions about their position regarding land grabs and the dispossession of indigenous people. Under the circumstances, on whose side are they - the People, Profit or Planet?

White *et al.* (2012) posit that the reason for the transnational and foreign governments land grabs is the need for setting up Special

Economic Zones (SEZ) and other huge infrastructure corridors. These involve huge infrastructure “investments” normally built to link extractive zones/hinterland/peripheries with metropolitan areas and international markets. They are funded by global financial institutions such as International Monetary Fund, Inter-American Development Bank, the World Bank as well as some giant Chinese and other transnational “investors”. According to van Dijk (2016), the Chinese government has set up many Economic and Trade Cooperation Zones in many African countries which include Ethiopia and Zambia. The morphing of land grabs is apparent and their spread is fast and furiously driven by the increasing demand for raw materials, the New World Order, full spectrum dominance and profit motive. The urge to take the first mover advantage is spurring countries to move in all directions with ferocity and aggressiveness while disregarding the consequences on the dispossessed [African] people.

The other reason proffered for land grabbing is the creation of ‘new financial instruments intended to reduce market risk while allowing third party “investors” to profit from widespread concerns that food is running out’ (White *et al*, 2012:629). Evidence can be drawn from such private equity groups as TIAA-CREF (a US pension fund), Berkshire-Hathaway, the Pharos Group (led by George Soros) and Black River Asset Management (led by Cargill), and many more new players managing a variety of “investments” which include land grabbing in foreign nations globally (Pearce 2012). The Oakland Institute (2011) observes that pension funds from US universities play a big role in the on-going land grabbing in Africa and other places. This need for diversification of and creation of new wealth by “investment companies” is in line with Karl Marx’s earlier assertion that, ‘chased around the world by its burning desire for ever-expanding markets, the bourgeoisie has no choice but to settle everywhere; cultivate everywhere; establish connections everywhere . . . it creates the world in its own image’ (Marx and Engels, 1848 in White *et al*, 2012). This Marxist analysis is germane but it is necessary to add here that, as far as Africa is concerned, the transnational corporations and foreign governments do not just come to settle, cultivate, invest and establish connections but *a fortiori* they come to

dispossess, steal resources and colonise. This has, thus, seen many of them reaching out to the nations of the global south and robbing indigenous people of large pieces of land. This is also reminiscent of colonialism/imperialism, or its new forms, the wolf, dressed in sheep skin.

Mis-justifications of Land Grabs

The [mis]-justification for large scale land grabs is based on what White *et al* (2012:632-33) referred to as “series of crisis narratives, linked to growing scarcity and impending catastrophe.” It is now assumed by the looters that to obviate these imminent food, energy and climate crises, it is imperative to grab the so-called “empty”, and “marginal land” across the globe. Assessment studies on the “world’s available land” done by the World Bank, for example, reached the following conclusion; “The currently non-cultivated area suitable for cropping that is non-forested, non-protected, and populated with less than 25 persons/km² (or 20 ha/household) amounts to 446 million ha. This is equivalent to almost a third of globally cropped land which is 1.5 billion hectares’ (World Bank, 2010: xv-xvi, Transnational Institute, 2013). By dissecting non-cultivated land in this way, the World Bank was directing attention to lands of opportunity with potential for land grabs.

The World Bank’s research further plotted land potentially available against its potential for increasing yields (the ‘yield gap’) for all countries and came up with four categories: i) those with little land for expansion and a low yield gap; ii) those with suitable land and a low yield gap (Brazil, Argentina and Ukraine); iii) those with little available land and a high yield gap (Malawi, Rwanda, India) and finally iv) those with suitable land available and a high yield gap (Sudan, Tanzania, Zambia and Mozambique). The fourth category has countries with huge pieces of suitable land, with many smallholders but with very low productivity and argues that if labour supply constrains smallholder expansion, larger mechanised farms are a viable strategy (World Bank, 2010: xviii). According to White *et al* (2012), the report thus justifies land grabbing, arguing that commodity-level analysis shows that ‘in many African countries with

large amounts of suitable but currently uncultivated land, transfers of technology could provide large benefits to local populations' (World Bank, 2010: xviii). Transnational Institute (2013:5) also quoted the World Bank report which advocates land grabs, arguing that 'when done right, larger-scale farming can provide opportunities for impoverished countries with large agricultural sectors and "ample endowments of land". To make the most of these opportunities, however, countries will need to better secure local human rights to land and improve land governance. However, Transnational Institute (2013:5) opposes the idea of "unused lands", reasoning that 'the reality is that the land is not empty, idle, or unused; and many investors are going for prime - not marginal or degraded land.' It is evident that land grabs are targeting prime and productive land. It would be foolhardy and reckless to target barren land. Barren land does not provide quick returns for the transnational corporations and foreign governments. This explains the impetus and logics for the on-going land dispossession.

Because of these mechanisms, technologies and institutional arrangements, Africa and the rest of the other poor regions have lost a lot of land to land grabbers in land deals. Although NAPE (2012) notes that it is not easy to come up with the exact sizes of land that has been grabbed, estimates claim the amount ranges from between 80 to 227 million hectares (Borras *et al*, 2011; Oxfam, 2011); while GRAIN (2011) identified 62 million hectares of grabbed land in 27 African countries. Land grabbing is the new technology for dispossession. The next section looks at the impacts of land grabbing on the African impoverished whose survival is dependent on the land.

Injustice and impacts of Land Grabs on Host Communities

A number of past studies have noted some significant impacts of such land grabs and these may include changes in social class relations, "the emergence of new 'middle class farmers', processes of differential accumulation and dispossession, which lead to eviction of some local populations and land size cuts, highly gendered patterns of labour participation and wage levels where women are

systematically disadvantaged, declining human development, higher morbidity and lower nutrition due to lack of services; as well as the broader processes of social dislocation of people from their ancestral homelands” (Julia and White, 2012: 45). APRODEV (2014:10) highlights the problems of land grabbing as follows: ‘i) a violation of human rights, particularly the equal rights of women; ii) not respecting the principle of free, prior and informed consent of the affected land-users; iii) not based on a thorough assessment, or in disregard of social, economic and environmental impacts, including gender impact; iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefit sharing, and; v) not based on effective democratic planning, independent oversight and meaningful participation.’ The lack of participation of community is disempowering. The violation of women’s rights takes humanity backwards on a trajectory of human development. The impacts of land grabs are profound to the extent that they induce vulnerability and weaken the resilience of communities for future circumstances since the processes induce psychological, financial, political, moral and other related stress.

These huge land grabs have negative consequences for the Africans who are immediately affected. The World Bank (2010, xiv) argues that ‘in most cases the expected “job creation” and net “investment” were very low’, and this observation was further affirmed by several other studies which include Anseeuw *et al.* (2012) and Oxfam (2012) who realised that the employment-creation claims are often inflated. NAPE (2012:19) argues that most of the jobs on offer are menial, poorly remunerated and usually with workers not drawn from local communities. This also is a re-enactment of conditions of slavery – a new wave of slavery disguised in concepts of job and income creation for the local people. These disguises are a farce since they are a travesty characterised by little or no depth. These investment deals involve disposessions and expelling people from their agricultural lands without absorbing their labour in the manufacturing sector or elsewhere in the economy and thereby having a surplus population from among the dispossessed (Araghi 2010). Arguing along the same line of reasoning, but with reference to Mozambique, Tanner (2010:125) concludes that; land deals

resulted in ‘a dispossessed rural majority, and migration to towns,’ further arguing that Mozambique, due to poor industrialization, does not have the capacity to generate enough jobs to cater for the dispossessed peasants and their families and thus resulting in high urban unemployment. Besides being inefficient in addressing poverty and inequality, land grabs have the potential to exacerbate and worsen the unemployment situation of indigenous people.

Such arguments give credence to the testimony that the much preached win-win situation in these “deals” is mere talk because in reality the land grabbers are arrogating and appropriating the surpluses and profits to themselves. Cotula (2011), reporting his findings from seven African countries (Cameroon, Ethiopia, Liberia, Madagascar, Mali, Senegal and Sudan), notes that one common feature in most land grabs is that indigenous people are rarely consulted or even informed before the rolling out of such dispossession. Lack of participation thus points out to exclusion. Holmen (2015) highlights that most of these land grabs are not aimed at resolving Africa’s problems but are aimed at helping other parts of the world. The current trajectory has shown the immiserating impact of land grabs. In other words, land grabs are causing misery than happiness among local communities. Marx observed that: “This is the absolute general law of capitalist accumulation [original emphasis] ... It establishes an accumulation of misery, corresponding with accumulation of capital’ (Marx, 1906 [1867]: 707, 709).

Land grabs dispossess rural people of their land; yet the rural people rely on land for their social, economic and cultural survival. This has negative impacts on their livelihoods, raising the question: how can one survive when one’s only source of livelihood has been taken away? - and thus entrenching them into impoverishment juxtaposed with immiseration. Transnational International (2013) argues that the shift of land use from food crop to non-food crop production results in food shortages, as land that is supposed to produce food is used for some other purposes. This development creates food insecurity situation in local communities and host nations. This creates a situation of food precariats instead of small scale farmers who are food secure. Precarity is becoming a common

characteristic of land grabs as the food security of small scale farmers is threatened and undermined in worst case scenarios. White *et al* (2012:620) also argue that land grabs, which are often disguised as 'land deals' "open the way to a truly wide-ranging global 'land reform'. Once taken over, production takes a new face through rapid exploitation of rural resources leading to their adverse incorporation in vicious global commodity value chains to benefit the already rich transnational corporations and foreign governments-land grabbers, thus spelling doom to the dispossessed and impoverished populations.

Besides dispossession of land, locals also lose control and access to other related resources. Woodhouse and Ganho (2011) note that land deals are followed by the discussion over water access. Crop production does better near water sources. Rodríguez-Labajos (2014) argues that there is a direct link between land grabbing and water grabbing and indirectly leading to desertification in Africa. The situation is due to the fact that most of the land grabs are water-intensive in the form of large scale agro-industries. This means total exclusion and adds the misfortunes of the impoverished, who are robbed of their arable lands, grazing lands and access to water bodies. Life without these, especially for the already marginalised rural populations is unbearable. Deprived of arable and grazing land transforms farmers to traders, should they manage to switch their trade. This also results in the expansion of the nonformal sector in Africa. Land grabs have migration effects – they induce migration; unemployment effects – they may induce unemployment; displacement effects – people are moved from their homes; dispossession effects – people are dispossessed of their livelihood resources and assets resulting in their capacity to accumulate being impaired; vulnerability effects – land grabs expose people to shocks and stress; psychological effects – these are immeasurable impacts on people's self-confidence and self-esteem and so forth.

Agro-industrial "development", natural resource extraction and rapid "urbanization" which are often posited as products of land grabbing have in fact heightened the vulnerability and hopelessness of rural populations. They have also resulted in the 'privatisation of previously public assets and the financialisation of economic

networks, linked to a new form of recolonisation,' and presented negative impacts on rural economies and agrarian livelihoods (White *et al.*, 2012). Nally (2015) reasons that it is noteworthy that land grabs structure and create new power relations in the global food economy and dictate the tempo of agrarian transformation. These have implications on agro-based livelihoods and rural lives. Publicly owned assets which are supposed to benefit the impoverished are thus "enclosed", and the already "rich" are given the opportunity to make profits out of these resources, while others – the impoverished, are excluded (also see Harvey, 2005). Drawing examples from Uganda, NAPE (2012) found out that 6,500 hectares have been grabbed for oil palm estates in Kalangala at the expense of African families which now no longer have any formal human rights to land which is in fact theirs. Land grabs are an infringement of African people's human rights to ownership of land.

Again, after occupation by land grabbers, Africans living on the margins are also set to lose some of the freedoms that they used to enjoy before. It becomes a crime to just pass close to the new operations such as mining fields if one is involved in economic activities such as herding cattle since it is difficult to recover any stray herd of cattle. This development leads to loss of geographical "community" social, economic and cultural freedoms.

The establishment of Special Economic Zones (SPZs) can also be a source of conflict. Traditional land owners might resist policy directives from local authorities, governments and/or private "investors" to annex their land supposedly for the purposes of huge infrastructural projects resulting in conflict (Baye and Ngah Epo, 2012). In India, Levien (2012) noted that SPZs have become "epicentres of the country's land wars" as farmers engage in the struggle to retain their land. The tension can even grow to result in the potential for riots, and at worst can even trigger civil wars involving dispossessed populations. Examples of wars attributable to land dispossessions in Africa include conflicts in Liberia, Sierra Leone and Sudan (Warner *et al.* 2012). In Madagascar, the government's decision to cede 1.3 million hectares of land to a South Korean company for maize and palm oil production in a 99 year-long

deal ended in a military coup which saw the overthrow of the then president Marc Ravalomanana (Vinciguerra, 2013).

Above all, dispossession and displacements have some sociocultural implications on the side of the displaced. In Zimbabwe, the Shona culture believes that there is a strong relationship between the living members of a clan and the dead/their ancestors. The Shona thus believe in staying close to their burial sites, looking after their graves such that relocation to other areas equates to abandoning their dead relatives and is seen as taboo, unless if it is done for culturally acceptable reasons (Mwandayi, 2011). As such, land grabs are also a violation of such cultural beliefs and rights. Beban and Work (2014) argue that land is sometimes attached to religious/cultural spirits and dispossessing or change in ownership and usage can cause a curse to the local population. These factors are rarely considered when land grabbing decisions are reached yet the issues related to the desecration of ancestral graves and the fate of their sacred forests are always rife in many cultures across the world.

Conclusion

In conclusion, it can be argued that [African] people must have land and national sovereignty which entail ownership, control and the right to define their land policies in tandem with their contexts to ensure sustainable livelihoods through the production, distribution and consumption of own crops through the efforts of local, organic change agents. Land and national sovereignty are about ownership, control, access, availability and sustainable utilisation of land by indigenous Africans. For social justice and the realisation of land and national sovereignty, reclamations of land by indigenous Africans are necessary.

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Contemporary Transnational Corporations' Land Grabs and the Implications for African Smallholder Farmers in Tanzania

Theobald Frank Theodory

Introduction

For the last ten to fifteen years, the African continent has experienced waves of transnational corporations and foreign governments' land grabbing. During that period, transnational corporations and their foreign governments have seized large areas of land ostensibly for "agribusiness", "biofuel production" and "conservation" in Africa. It has been reported in different parts of Tanzania that large parts of land are being grabbed by transnational corporations for speculative motives in the anticipation of future rises in land prices (Skartein, 2015). If such trends are not checked, there is a danger that smallholder farmers in Tanzania will increasingly be expelled from their traditional land and they will be left without alternative means of livelihoods or sustenance. This chapter critically engages Marx's theoretical concept of "primitive accumulation" to divulge how the current land grab is a reconstruction of capitalist and colonial relations aiming at dispossessing Africans. Using two districts, Muleba and Misenyi, as case studies, this chapter unpacks these land grabs in the study area and evaluates the costs and benefits to smallholder farmers, rural households and the environment.

The reported 2007-2008 global food crises saw the transnational corporations and foreign governments making a pretext that they wanted to tackle the problem of food insecurity worldwide, by grabbing land from indigenous people. On the pretext of the global upsurge in fuel prices, the transnational corporations and their foreign governments also resolved to grab African land supposedly in order to produce biofuel related crops that are used in the manufacture of biodiesel (Benjaminsen *et al*, 2011; Kuhlmann *et al*,

2011). In view of this, leaders from the global north, during their G-8 summit held in Italy in July 2009, issued the *L'Aquila Joint Statement on Global Food Security*. This joint statement stressed their commitment to take serious action in dealing with human hunger and poverty through improvement of food security, nutrition and sustainable agriculture. They pledged to mobilise US\$22 billion over three years to support global efforts of freeing humankind from food insecurity, yet the supposedly 'global efforts to free humanity from hunger' turned out to be an exercise in dispossessing indigenous Africans who are being robbed of their land. In so doing, a comprehensive approach to food security alongside effective coordination in supporting food insecure countries was established that involved foreign corporations (Kuhlmann *et al*, 2011: 1). The foreign corporations involved in food security at the same time had exhibited interest in biofuel related crops to enhance availability of biodiesel (Benjaminsen *et al*, 2011).

On the basis of the above pretexts to free humanity from hunger and to produce biofuels, Africans are being dispossessed of their land in (neo-)colonial style. It is from this milieu that Africa's land is targeted by these transnational corporations and foreign governments which misrepresent land on the African continent as abundant (Benjaminsen *et al*, 2011). In fact Africa's land is not necessarily abundant, even if so, Africans should not be robbed on the pretext of abundance of their land.

Contextual Issues on Land Grabbing in Africa

The history of land grabbing in Africa commenced in the colonial era when chunks of land were seized by European settlers for plantations and mines. Even today the African land, which is rich of natural resources, is being robbed by different transnational corporations hunting for copper, oil, diamonds, gold and uranium. This is apparent in some countries in Africa where local communities are losing their land or are being expelled after the dispossession. For instance, this happened in North Mara (Tanzania) where many local communities were dispossessed of their traditional land which was subsequently turned into gold mining sites (Lugoe, 2011). A similar

observation was reported in Niger Delta for the extraction of oil in which hundreds of local people were evacuated (Ebegbulem *et al*, 2013).. As indicated by the *Global Land Matrix* that the acquisitions of about 39.6 million hectares (396,000 sq. kilometres) of land, were completed by the end of 2014 as transnational corporations grabbed land from indigenous people. This area is considerably larger than the area coverage of Germany (349,000 sq. kilometres).

In Africa, particularly Sub-Saharan Africa, transnational corporations and foreign governments' land grabs are spreading widely. Most of the countries in this region seem to be the victims of such land dispossession. In most cases, these land grabs are carried out by foreign corporations and their governments (Skartein, 2015). Such land grabs have been accomplished under the guise of agriculture "investment" for the production of food or biofuel feedstock following perceived global food insecurity and the rise of fuel prices (Massay, 2012). This in turn, has placed African land under enormous pressure as many livelihood activities of the African smallholder farmers have been disrupted by transnational corporations' land grabbing.

Despite the increase in these land grabs, it is difficult to estimate the exact scale of land dispossession particularly in African continent. This in fact is due to secrecy and the reluctance of institutions, individuals and transnational corporations involved to publish the quantum of land which has been grabbed (Mousseau and Mittal, 2011; Cotula, 2011). Thus, accounting for quantum of land grabs remains contested and controversial. Inaccessibility of documents about the exact scale of land grabs has also been reported in Tanzania. According to Mwami and Kamata (2011) data on land grabs is not easily available. Furthermore, even where land grabs are discussed with village governments and villagers, overall public's awareness is often minimal (Landy, 2015).

Tanzania is one of the world leading countries from which large amounts of land have been grabbed by transnational corporations (Anseeuw *et al*, 2012). In recent years there have been influxes of transnational corporations, from different parts of the world, which have since been involved in dispossessing indigenous Africans of their land. This in turn has negative consequences on the rural

household population and the environment as broadly discussed by academicians, advocacy groups, and politicians (Locher and Sulle, 2013). Despite the on-going land grabs, the Tanzanian government is working hard to attract more transnational corporations under the misapprehension that these land grabbing corporations are bonafide investors. Contrary to liberation era promises to restore land to, and support, indigenous Africans, the Tanzanian government considers African small scale farming as an impediment to “economic development”. Thus, a transition to large-scale commercial farming is considered crucial in order to attain higher agricultural productivity, which will increase exports, particularly food crops (Skartein, 2015:100). It was from this milieu that “agrarian” transformation in Tanzania became an important national agenda particularly with the support of the fourth President Jakaya Mrisho Kikwete through his popular brainchild of *Kilimo Kwanza* (agriculture first) strategy.

Currently, the patronage that land grabs receives from the Tanzanian government fits into the larger “formal public development policy narrative that emphasises the role of “private” institutions, involving prominently foreign capital inflows, that are held to facilitate the creating of wealth and employment” and the private interests of local elites who control much of state’s activity (Nelson *et al*, 2012:19). This contemporary wave of land grabbing began soon after the government of Tanzania launched the New Land Acts in 2001. The Acts in question entrusted the responsibility of land management and administration to village governments; accentuated the registration of land rights including communal and customary rights, and promoted formal markets in land (Pedersen, 2011). The Land Acts protected the customary rights of land users, smallholder farmers and communal land. However, transnational land grabbing in Tanzania is intruding on local customary rights, marginalising rural household farmers and pastoralists who greatly depend on land, water and other natural resources (Nelson *et al*, 2012: 2).

While the government strives to put in place an enabling environment for attracting more transnational agribusiness corporations in Tanzania, events on the ground are continuing to

move rapidly. These include its decision to reform policies, legal and institutional frameworks to suit the dynamics of international trade and commerce (Massay, 2012). In executing this, the government took a deliberate decision to amend the Village Land Act No. 5 of 1999 to grant greater access of village land to “investors” (Mbunda, 2013). This decision was not welcomed by the majority of the rural impoverished population and various civil society organisations that fear that land grabs will favour large scale producers’ access to land at the expense of the smaller ones. Rural populations have further voiced their fear that the on-going land deals, will neither improve their livelihood nor transform their traditional farming system (The Citizen, 2012; Qorro, 2011). Today, large scale land grabbing is carried out in Tanzania through the application of either force or consent. The former is a result of the stern resistance by those who are evicted while the latter is a result of material gains promised to the evictees to be obtained from the proposed land grabbing venture (Mwami and Kamata, 2011). Displacement of local communities from their land will ruin the local economy and destroy their culture. Many researchers working on land grabbing have noted the similarities between the present land grabs and the enclosures of land and dispossession of peasants in England (Adnan, 2013; Hall, 2013; Ince, 2014).

Marx situated “enclosures of land and dispossession of peasants” at the centre of his analysis of “primitive accumulation” and, thus, at the very origin of capitalism (Skartein, 2015). However Marx was writing specifically about Europe and not in the context of colonial Africa; for this reason it is important to notice that colonists did not *merely accumulate* African land, rather they *robbed* Africans of their land. Hall, (2013) links new enclosures’ to the land appropriations of centuries of imperialism and capitalist expansion, particularly in African continent. Thus, this chapter engages Marx’s theoretical concept of “primitive accumulation” to understand how land investments under the guise of agriculture transformation in Missenyi and Muleba Districts, Tanzania are impacting the smallholder farmers.

Land Grabbing: An Incessant Dispossession or Primitive Accumulation of Capital

Interests of foreign corporations on Africa's land and natural resources are in full swing. This contemporary wave is a 'scramble' in the classic sense of the term. It involves mega International Corporations in a 'geopolitical' struggle to loot chunks of land for agribusiness. This scramble has the same impetus and definite antecedents in Africa's recent past (Moyo and Yeros, 2011). Under this new scramble, it is apparent that large parts of Africa's land will be looted by foreign corporations believed to have mightier capacity in terms of technology for fostering agricultural transformation in Africa, compared to local African corporations. This in turn will affect the indigenous Africans, particularly rural populations whose land is looted by agribusiness. It is against this backdrop that this new scramble seems to manifest features of primitive accumulation. As a result, many critical scholars in recent years are increasingly extending Marx's understanding of "primitive accumulation" in order to develop theoretically informed explanations of the on-going global land grabs (cf. Baird, 2011; Kelly, 2011; Adnan, 2013; Ince, 2014).

Coined by Karl Marx in *Capital, Volume I* (1976 [1867]), the concept of "primitive accumulation" explicate an historical process, in which a demarcation is created between producers and their means of production or subsistence, such as land. In so doing, the producers *sans* means of production are left with limited choices but to join the industrial reserve army working in urban industries while their old land has been confiscated for (neo-)colonial agricultural capitalist production. This is evident in many African countries where large parts of land deemed "idle" land has been grabbed by foreign transnational corporations leaving smallholders farmers with no alternative livelihoods. This mode of production is a compulsory process of producing the colonial capital-relation, the social division of labour that is a condition for the colonial-capitalist mode of production (Kenney-Lazer, 2011: 3).

Many critical scholars have variously invoked global capitalism and neo-colonialism to explain the contemporary wave of land acquisitions spearheaded by foreign corporations. One profound

account for global land grabs as a reconstruction of “primitive accumulation of capital” is closeted on the argument that lands in the Global South are “enclosed” and brought within the ambit of global coloniality and capitalism (Ince, 2014: 1). Some land grabbing debates uncritically equate the experiences of rural Africans with the English experiences during the preceding enclosures. In these narratives actors including foreign governments, foreign corporations as well as international financial institutions are equated with the British landlords. However, uncritically equating the history of the colonised Africans with the history of the British colonisers has the sad effect of erasing the history of the colonised. Some of the similarities drawn include: the expropriation of the rural households’ land, enclosure of common lands, and the rise of free labour. In this regard, it is important to note that as far as Africa is concerned, colonists did not merely expropriate land [like in the British case] but they robbed Africans of their land and also Africans did not necessarily have common lands, in the sense of the land being open for colonists to occupy and claim, rather Africans had their own publicly owned land access to which was delimited and defined through precolonial African laws. These points trouble the uncritical analysis of African experiences in terms of primitive accumulation in the English enclosures (Midnight Notes, 1990; Dalla Costa and Dalla Costa, 1995). Through these uncritically drawn resemblances, it is easy to efface “global coloniality in Africa (Ince, 2014: 109).

In this view, some attempts to put land grabbing in the broader dynamics of coloniality and capitalism, will find primitive accumulation and colonial dispossession pertinent to the analysis seen as ‘the processes by which land and other resources are robbed and enclosed, and their previous users dispossessed, for the purposes capital and colonial accumulation are central to both’ (Koponen, 2014: 4; Hall, 2013: 1583). There are living testimonies in different parts of the Global South in which indigenous Africans have been expelled from their land; and local communities have lost their customary human rights to land due to land grabs (see Edelman *et al*, 2015; Borras Jr and Franco, 2015). It is from this perspective that many uncritical scholars have simplistically deployed Marx’s concept of ‘primitive accumulation’ to account for the current land grabs in

(neo-)colonised African. The beginning points in analysing African land dispossession should be African colonial and enslavement histories which differ from the British colonisers' experiences.

In this view, from a Eurocentric point of view enclosures have been essential components of the development and spread of colonialism and capitalism all over the world across space and through time. Thus, the on-going trend of land grabs in the Global South, particularly Sub-Saharan Africa have been conceptualised as incessant processes of "enclosure", under capital's ambition to accumulate (Makki and Geisler, 2011; Akram-Lodhi, 2012). In brief, the basic feature of primitive accumulation entails the expropriation from the immediate pre-capitalist producers of their means of production and livelihood, thereby altering land, other natural resources, and labour into commodities or objects for capital accumulation. The displaced populations are left with nothing to sell to the capitalist rather than their labour power. Consequently, the displaced populations are exploited as wage labourers (Skartein, 2015). However, as far as Africa is concerned the dispossession and displacement was not necessarily of "pre-capitalist" producers but that of African pre-colonial producers whose resources were stolen by colonists.

According to Marx, the expansion of capitalist mode of production depends on accumulation of capital accrued from commodification of land, natural resources and labour power. Whenever capitalism "conquers" and destroys pre-capitalist modes of production, the same process will be reiterated (Skartein, 2015). This is considered as evident in Tanzania in the Southern Agricultural Growth Corridor of Tanzania (SAGCOT) where the "investment" blueprint of this project indicates that large parts of land will be made available for "investor" capitalists. The investment blueprint simplistically emphasises that employment opportunities will be made available to local populations along the corridor (SAGCOT, 2011). It has been noted that smallholder farmers along the corridor are swiftly being pushed into the colonial-type wage-labour markets in ways that cannot be deemed voluntary or beneficial to them. Similarly, indigenous farming systems along the corridor have been entirely overshadowed by large scale farming executed by foreign

corporations. An attempt has been made to transform smallholder farmers to produce for the “global” market. To this end, local communities have been forced to abandon their indigenous seeds and use toxic genetically modified seeds and chemical fertilizers, which are produced by foreign corporations, like Monsanto and Syngenta (Paul and Steinbrecher, 2013). Indeed, since primitive accumulation exists outside the circuit of capital, “conquering” land and labour for the amassing of capital, “conquests, enslavement, robbery, murder, in short, force, play the greatest part” (Skartein, 2015: 107). This is apparent in the Global South where most of the dispossessed land has been taken by force without informed consent from the local communities (cf. 4.2). Inopportunely, in some countries it has been reported that the state has been the frontrunner in supporting the foreign corporations to grab the land, since much of the land grabs have been negotiated in closed doors (cf. 1.2). Thus, primitive accumulation is a political process and is a never-ending circle of capitalist mode of production.

‘Accumulation by Dispossession’ in the Case of Muleba and Missenyi Districts

The data used in this chapter were collected as an empirical study in Muleba and Missenyi Districts in 2014. The study was qualitative in nature. The collection of detailed information was possible after I had developed an intimate relationship with the local communities during two round trips in both districts. Before undertaking the fieldwork, I was a full-time resident of Muleba District for four years and later of Missenyi District for more than ten years. This gave me smooth access to the field, both directly via continued visits to the villages and through relatives and friends from areas of interest. Currently, I am no longer residing full-time in either of the two districts but I still visit the places from time to time. I also made use of data collected by local journalists working for different media houses within the region and beyond. This helped me to garner relevant information on the magnitude of land grabs in the study area.

Data was collected using semi-structured interviews with indigenous Africans, village leaders, government officials (regional and district levels), representatives of the transnational corporations, and retired government officials residing in the area. Between August and November 2014, I interviewed village chairmen (*Wenyeriti wa Vijiji*) in six villages (Magata, Karutanga, Katanga, Bugorora, Kitobo and Kabingo) who were impacted by the land grabs. Furthermore, between April and May 2016, I conducted focus group discussions (FGD) in a wide spectrum of local communities including farmers and livestock keepers. Key Informants Interviews (KIIs) were carried out with five villagers in each village in order to gain an understanding of the problem in question. The study was also benefitted from data collected from documentary reviews including “investment” contracts between “investors” and local authorities. Finally data were analysed using appropriate software.

Commercialising Land for Agriculture: Who is the Loser?

Mobilising land is a key to facilitate commercial agriculture in Tanzania. Access to ample suitable land for transnational agribusiness is listed as one of the 80 principal requirements to commercialise agriculture in Tanzania (SAGCOT, 2011). Accordingly, the government is struggling to create an enabling environment to incentivise transnational agribusiness and assist transnational corporations with access to fertile land, which is deemed “underutilised or “unused”. The government has assured the “investors” who are willing to “invest” in agriculture that land is available. Various government officials from the regional to district level have been quoted repeatedly during the fieldwork asserting that “land is available”. This was a common phrase unequivocally vindicating that ‘land was not a problem’. The position was echoed by local leaders including Councillors, Ward Executive Officers (WEO), Village Chairmen (from all villages), and Village Executive Officers (VEO). Such assurances misleadingly suggest that there is no pressure on the available land and land grabbing should not concern them. However, local people in the studied villages were concerned with land availability following the land grabbing as

productive land was no longer easily accessible for the impoverished Africans who lack capital and transport as it was already occupied by the so-called investors. The concern raised by the villagers is corroborated by population density statistics. The average population in both districts is about 742,942, with a projected annual increase of 3.2%. The 2012 Population and Housing Census show signs of an increasing population pressure in both districts given the available land.

Many African smallholder farmers in both districts were anxious whether the available land would be sufficient for their livelihood activities and for agribusiness. The critical concern here was the issue of marginalising African smallholder farmers from owning and accessing land to perform their livelihood activities including but not limited to farming and livestock keeping. Many smallholder farmers have been evicted from their traditional land hence unable to perform crucial cultural practices. One respondent from Magata Village in Muleba District had the following remarks regarding the traditional land being seized for transnational agribusiness:

In this village there was a village forest where all cultural practices were undertaken. Within this forest there were big trees called *emirundu*, which were very important for worship and appease to traditional God (*Wamara*). In case of any problem related to environmental change including scarcity of rains or long dry seasons, the community members would convene under the *emirundu* and pray for rains. Nowadays there is no such forest in this village as the government has leased out all the land with this forests for agribusiness (KII, Magata Village, 2014).

However, the role of African smallholder farmers in agriculture production have been reduced and they have turned to be mere labourers on transnational plantations including those owned by Global Agency Company Limited, which “own” chunks of land in Bugorora Ward, Missenyi District. The role of African smallholder farmers has been undermined to create space for transnational corporations’ agriculture in both districts. Despite widespread misperceptions that there are huge amounts of land available for agribusiness in both districts, there is no accurate information from district councils indicating how much and what type of land is

available for transnational agribusiness. In one of the interviews with the District Agriculture Officer (DAO) in Missenyi District, it was mentioned that about 1329 hectares of land have been earmarked by the district for transnational agribusiness. This was contrary to the information provided by Ward Executive Officer (WEO) of Bugorora Ward that more than 2000 hectares of land in Bugorora Ward was “leased” out to “investors”. Such contradicting data regarding the available land for agriculture “investment” in Missenyi District poses a fundamental question to the government on whether the land is sufficient or not. It is very possible that the “ground reality” is that there is scarce land that is currently legally available for the government to “lease” out to “investors” who are ready to “invest” in agriculture.

Taking Land Grabbing to the Field: The Challenges of Land Grabbing

The findings revealed that large-scale land “investments” for agriculture and conservation activities pose significant risks to African smallholder farmers, especially if not well managed. It was revealed that a large part of the land has been “leased” out to transnational “investors”. This could have hopefully assisted the Africans to address some of the adverse poverty impacts. The findings illustrate that in many instances some transnational “investors” have been unable to fulfil these promises, but instead have contributed to undermine African indigenous livelihoods. Such problems included displacement of local people from their traditional land without prior informed consent and proper compensation. It was reported during the interviews with local people from both districts that thousands of hectares of land have been “leased” out to foreign “investors” for agriculture “investment”. This had great impact to African smallholder farmers as they could not extend farming activities to village land. The government decision to “lease” out the land for transnational agribusiness was not welcome by indigenous African people who raised fundamental concerns regarding their future farming and livestock keeping activities. This

is evident from the words of a female focus group discussion participant, who stated:

Before, we could expand our farming and grazing activities in the village land (idle land) especially during long drought seasons. But these days large parts of the village land have been leased out to investors who came with a lot of promises to help smallholder farmers. We are really in trouble as when we experience a long drought season, it is impossible to extend our farming and grazing activities into already leased land to investors (FGD, Bugorora Village, 2014).

It is apparent that many indigenous African people rely much on 'idle' land in the village for farming and grazing especially during long drought seasons. The decision of the village government to "lease" out village land to the "investors", has affected the livelihoods of the indigenous African people. Moreover, livestock keepers directly depend on rangelands and wetland for grazing purposes during dry seasons. It was reported that large parts of the rangelands has been designated as conservation areas and the wetlands are strictly outlawed for any human activities such as agriculture and grazing. This was reported in Kabingo village where both indigenous Africans and local authorities were not happy with the government's decision to designate the Ngonono wetland area as a conservation area. For ages indigenous African people have been depending on that wetland for their livelihood activities, using it for grazing livestock and agriculture activities. In recent years, such activities have been banned in the adjacent wetland, which adds more pressure to the existing scarce land. Similar sentiments were echoed during an interview with one respondent in Kabingo Village as evident from the following excerpt:

In recent years government has designated the Ngonono wetland area to be a conservation area. This wetland was significant to the community for agriculture and grazing especially during long dry seasons. In 1997 when we were affected by drought, this wetland was so helpful to many of us. Had it not been for this wetland, we would have died due to hunger. Villagers had to undertake farming activities in this wetland and we had bumper harvests from the wetland. As the

wetland has been designated as a conservation area, we are not allowed to undertake any farming and grazing activities within it (KII, Kabingo Village, 2014).

Furthermore, in some of the villages such as Katanga and Magata indigenous African people condemned the village authorities for not being transparent when they signed land “contracts” with “investors”. It was reported during the interview that no one can exactly say how many hectares of land have been “leased” out to transnational “investors”. Many “deals” in land “leases” are characterised by confidentiality and a lack of transparency. Indigenous Africans expressed their concerns over land “deals” as they do not specify any clear and binding commitments to benefit the indigenous people. Due to the lack of clear clarifications, indigenous people have found themselves in conflict with the transnational “investors”. During a transect walk in Magata Village, I came across some children who were apprehended by one of the transnational “investors”: these children were accused of collecting firewood in his plot. I wanted to get his perspective regarding land grabs and how it affected the African smallholder farmers. This “investor” who owns 15 hectares of land had the following remarks:

I was given this land by the village government for my afforestation project.....It is none of my business to know where the rest of the villagers will graze their animals and undertake farming.....I was given this land following the advert made by the village government requesting anyone who was ready to invest on village land. I followed all the procedures to get this land and I have invested a lot of money in this afforestation project. I’m really annoyed if I find anybody trying to play with my money by chopping firewood, grazing animals or undertaking farming activities within my land (KII, Magata, 2014).

The above remarks indicate that indigenous African people are increasingly vulnerable as they are unable to obtain enough land for their livelihood activities. Rich and crooked people are being favoured by the market system because of their financial capacities and as a result, they access land at the expense of the livelihoods of

the rural impoverished. There are living testimonies of clashes between indigenous people and transnational “investors” over land administration in several districts in Tanzania, including Muleba, Missenyi, Mvomero, Bagamoyo, Kilwa, Kiteto, and Loliondo to mention the few (cf. Mbonde, 2015; Theodory, 2016).

Despite existing conflicts over land administration, the government in collaboration with Tanzania private sectors launched the *Kilimo Kwanza* initiatives in 2009 (cf. 1.1). The objective of this initiative was to refocus the agriculture sector through promotion of transnational large-scale agriculture and also, to transform subsistence farmers to commercial farmers on the model of the Green Revolution. In accomplishing this, *Kilimo Kwanza* aimed at enhancing land availability for large-scale capital investment and production. To this end, amendment of the Village Land Act No. 5 of 1999 was undertaken in 2004 to create enabling environment for transnational “investors” to have easier access to African villagers’ land. According to African smallholder farmers, *Kilimo Kwanza* initiatives inspire nothing but fear to them. In fact, the arable land of which for ages has been owned, controlled and used by African smallholder farmers for different livelihood activities has been “leased” out to large “investors” leaving them with limited land to extend their farming and grazing activities. This situation does not seem likely to improve their livelihood but may result in them falling into impoverishment trap.

This situation is already evident in the study area as it was observed during field work that chunks of land in Bugorora, Buchurago and Kabingo Villages have been “leased” out for agribusiness leaving African smallholder farmers with limited land. It was reported by the Ward Executive Officer (WEO) of Bugorora Ward that in his ward, Global Agency Company Limited has “leased” more than 2000 hectares for commercial agriculture in Buchurago and Kabingo villages. Though the company grabbed the land following the “legal” procedures as stipulated in the Village Land Act N. 5 of 1999, most of African smallholder farmers were not happy with the process. The whole process was surrounded by secrecy, and only local authorities were involved in “negotiations” and signing of

the “contract”. Figure 4.1 indicates the land “leased” out to Global Agency Company Limited in Bugorora Ward.



Figure 1: Large-scale farming in Bugorora Ward done by Global Agency Company

Source: *Fieldwork* (2014)

Evidence from the above pictures indicates that land grabbing is occurring in the study area under the guise of land “investments”, conservation area and game reserves. The government has been supporting different transnational corporations and “rich” individuals to access land for transnational agribusiness. African smallholder farmers have found themselves in trouble as their traditional land is “leased” out for agriculture “investment”. Surprisingly many land “deals” in both districts are sometimes undertaken without an informed consent from the affected smallholder farmers, which creates land shortages. Large part of this land has been taken without effective democratic planning, meaningful participation and independent oversight from the African smallholder farmers. This in turn has culminated in incessant conflicts between African smallholder farmers and transnational corporations. To this end, land grabbing in Tanzania is a leading culprit to African smallholder farmers’ vulnerability since indigenous Africans have no sufficient land for undertaking farming and grazing

activities, which would otherwise improve their livelihoods. Although it is often argued by some Eurocentric scholars that a **global sharing [or solidarity] economy** is on the way to Africa, the problem is that these transnational corporations are producing [for circulation in Africa] toxic genetically modified crops which have been rejected even in the Western countries of origin (Nhemachena, 2017; Mawere and Nhemachena, 2017). In essence the transnational corporations are grabbing African land so as to force Africans to consume the genetically modified crops which cause diseases, alter hormones, cause sterility and impotence, cause birth defects and induce hormones for homosexuality (Nhemachena and Mawere, 2017). Thus, it is paradoxical for the Tanzanian government, which is against homosexuality, to attract transnational corporations [or so-called investors] which come to Africa to produce crops that are designed to cause homosexuality, sterility, impotence and various kinds of cancer.

Concluding Remarks

A prerequisite for executing land “investment” is access to sufficient land suitable for transnational agribusiness. The government of Tanzania, alongside local government authorities in the studied districts who are closely involved in land “investment deals”, readily assume that land is widely available for agribusiness. This is vindicated by statements made by various central and local government officials regarding the decision to “invest” in agribusiness that ‘land is not a problem’. With such an assumption the government has provided ample support and enabling environment to local and foreign corporations that are ready to “invest” in agriculture in the study area. Despite this decisive commitment from the government side, it is not known exactly to what extent this land is available to “investors”. It has been observed in the study area that “rich” people and private companies, using their financial capabilities, have grabbed chunks of land for transnational agribusiness. Thus, what is being defined as land “investment” by the “investors” and the government officials, in fact is not, it is a replay of capitalist and colonial relations of dispossession and robbery.

Many African smallholder farmers in the study area have been expelled from their traditional land due to land grabbing and turned to be cheap labourers in transnational “investors” plantations. If the government, Southern African Development Community, Pan Africanist institutions and the African Union do not intervene and control this on-going situation, African smallholder farmers will be increasingly enslaved [by transnational corporations] on their own land.

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Peasants and Pastoralists in the Market Place: Land Grabs and the Sovereign Food System in Africa, the Malian Experience

Martin Uadiale & Anirejuoritse Awala-Ale

Dismembered from the land, from power, and from memory, the result is destruction of the base from which the people launch themselves into the world (Wa Thiongo, 2009).

Neo-liberalism calls on African countries to see the 'market' as the centre of the economy, by privatizing and transferring land from thousands of peasants to a hand full of investors. But we have data to expose the limitations of Neo-liberalism: the dangers of reducing peasants to economic agents with little political franchise. Capitalism wants to empower the market by expropriating the principal agents of production, and at the same time, hopes that there will be peace and order in the land (Falola, 2006: 174).

Introduction

Prior to the development of the concept 'food sovereignty', food sovereignty was already the guiding principle of [appropriate] food systems and social security on the precolonial African continent. Culturally acceptable and nutritious food had been produced by the African smallholder farmers in such a way that has ensured environmental sustainability through environmentally conscious methods. However, irrespective of the historical role played by these African smallholder farmers, governments of various African countries such as Mali have continually neglected them and have subsequently lost faith in their ability to adapt and address the growing situation of hunger and undernourishment. Thus, transnational biotechnology corporations like Monsanto and Syngenta are cashing in on the largely colonially induced food

insecurity in Africa. Producing and marketing genetically modified crops that are known to cause sterility, impotence, cancers, hormonal changes and induce homosexuality, the biotechnology transnational corporations not only have the effect of trampling on African food sovereignty but the GMOs which they produce are meant to effectively decimate the African population (Mawere and Nhemachena, 2017; Nhemachena and Mawere, 2017). The Malian government has unfortunately put its trust in the neoliberal transnational corporations' enterprise.

The aim of this chapter is to highlight the insidious nature of foreign corporations' land "investments" in Mali. It is the argument of this chapter that these foreign "investors" are in direct competition with the Malian farmers as they threaten their access to land, access to water and Mali's environmental sustainability and biodiversity. This chapter asserts that the cumulative effect of land grabs by these foreign "investors" threatens the sovereign food system in Mali and in turn eliminates any hope for controlling food security and food safety.

The Emergent Paradigm of Food Sovereignty

The term 'food sovereignty' was coined in the mid-1990s by Via Campesina and it represents an alternative approach to neoliberal policies which stress [global] food security, which is premised on food circulation in the world, rather than on [African] food sovereignty. Food sovereignty is a reaction to the ineffective neoliberal food and agricultural systems which have consistently failed to respect, protect and fulfil the [African] right to culturally appropriate food. Indeed, the modern-day food system is one fraught with contradictions and characterised by poverty, malnutrition and food insecurity (Pimbert, 2008: 21). The significant technological advances in agricultural techniques and methods have monumentally failed to translate into food safety, sovereignty and security around the world especially in Sub-Saharan Africa wherein the calorie intake remains below the recommended level of 2100 kcal and the number of hungry people increased significantly from 177.6 million in 1990-92 to a staggering 226.4 million in 2011-13 (Ambalam, 2014: 121).

Reinforcing the above facts, the Food and Agricultural Organisation (FAO) states that one in every four (1:4) people is estimated to be undernourished (FAO, IFAD and WFP, 2013: 9). This unfortunate and paradoxical state of affairs which exists in this era of mechanised agriculture and increased knowledge of agricultural productivity is an indictment of the global food security regime. Thus, food sovereignty has risen as a critique and corrective to this state of affairs.

Food sovereignty has been defined in several ways. La ViaCampesina (2003) has defined food sovereignty as:

...the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; to restrict the dumping of products in their markets... Food Sovereignty does not negate trade, but rather it promotes the formulation of trade policies and practices that serve the rights of peoples to food and to safe, healthy and ecologically sustainable production.

Food sovereignty can also be defined as the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems' (Nyéléni, 2007). Thus, food sovereignty aims at the consolidation of a food system in which genuine food security would be guaranteed (GRAIN, 2012: 2; Kefyalew, 2013: 6).

The concept of food sovereignty takes on various forms. According to Edelman (2013:1); 'It is at once a slogan, a paradigm, a mix of practical policies, and a utopian aspiration'. Furthermore, it is the inspiration for the formation of 'broad-based transnational coalitions, such as the Nyéléni Forum, which includes VíaCampesina' (Edelman, 2013: 1). The variegated nature of food sovereignty is reflective of the importance of the concept as it manifests in whatever form which is necessary for the achievement of food sovereignty. Food security according to Barraclough (1991: 1) is '...sustained and assured access by all social groups and individuals to food adequate

in quantity and quality to meet nutritional needs': although they are different, food security can be connected to food sovereignty.

An important element for the achievement of food sovereignty is the African smallholder farmers, who have historically worked towards the actualisation of food sovereignty, security and fulfilled the role of food providers for the African continent (FAO, WFP and IFAD, 2012: 30). However, despite the importance of smallholder farmers to survival, their existence is consistently threatened not only by some of their governments who ignore them; financial institutions are also reluctant to lend capital to African smallholder farmers. (Pimbert, 2008: 2; FAO, WFP and IFAD, 2012: 30).

However, the greatest threat to the developmental potential of the African smallholder farmers is the land grabbing of this century which equals, in intensity and voraciousness, the colonial dispossessive and exploitative abilities of the 19th century (Hall, 2011: 1; Taylor, 2015: 11; Vhugen, 2012: 4). Indeed, 'The four hundred years of Africa's association with the West has been shaped by a history of resource plunder' (Matondi, Havnevik and Beyene, 2011: 6). Therefore, this contemporary land grab is a form of 'new-colonialism'.

Land Grabbing and the Threat to Food Sovereignty

For the achievement of food security in a food system, food sovereignty is a necessity. According to Barraclough (1991: 1):

A food system offering food security should have the following characteristics: (a) capacity to produce, store, and import sufficient food to meet basic food needs for all groups; (b) maximum autonomy and self-determination (without implying autarky), reducing vulnerability to international market fluctuations and political pressures; (c) reliability, such that seasonal, cyclical and other variations in access to food are minimal; (d) sustainability such that the ecological system is protected and improved over time; and (e) equity, meaning, as a minimum, dependable access to adequate food for all social groups.

Land grabs in Mali make these conditionalities impossible. Land grabbing can be defined as:

...the capturing of control of relatively vast tracts of land and other natural resources through a variety of mechanisms and forms that involve large-scale capital that often shifts resource use orientation into extractive character, whether for international or domestic purposes, as capital's response to the convergence of food, energy and financial crises, climate change mitigation imperatives, and demands for resources from newer hubs of global capital (Borras, Franco, Gomez, Kay and Spoor, 2012: 851).

It consists of the grabbing of African land, and the dispossession and exploitation of African peasants by transnational corporations or foreign governments on terms that do not favour the indigenous inhabitants of the land (GRAIN, 2008; Murphy, 2013: 3; Zoomers, 2010: 429).

The ethicality of this practice is greatly debated and this is reflected in the variety of terms that exists which describe land grabbing. They include; 'foreignisation of land', 'Africa is for sale', 'large-scale land acquisitions', 'green colonisation', 'new land colonisation', 'climate colonisation', 'water plunder', 'subtle foreign annexation of national resources' (Borras and Franco, 2013: 1723; Zoomers, 2010: 429; Hall, 2011: 1; Matondi, Havnevik and Beyene, 2011: 1). However, the term that shall be employed in this chapter is 'land grab' as it properly encapsulates the insidious nature of the practice.

Posited as driving the contemporary land grabs is what can be termed the 'Triple-F crisis': food, fuel and finance (Hall, 2011: 1; LaFrancesca, 2013: 15). The contemporary land grab rush began after the 2007-2008 global food price crisis and financial crisis of 2008-2009 in which private enterprises and governments lost faith with the international market and sought other means of ensuring food and energy security as well as "investment" opportunities for their countries (Narula, 2013: 110; de Schutter, 2011: 251).

Just like the colonial era, the victim of contemporary land grabs is the African continent. To put it in context, the areas grabbed in

Africa is roughly the size of the United Kingdom (UK) and Germany (LaFrancesca, 2013: 16; Narula, 2013: 106; McMichael, 2011: 1). From the above, it is discernible what the motives of the involved transnational corporations and the foreign governments are. They hope to achieve food and energy security in their respective home countries. Be that as it is, the question arises concerning the benefits or disadvantages land grabs have on the host African countries (Adamczewski, Jasmin and Tonneau, 2011). Using Mali as a case study, this chapter aims to prove that land grabs threaten food sovereignty in Mali and in turn harm the crucial achievement of food security.

Land Grab and Food Sovereignty in Mali

Mali has been selected as a case study because it provides rich information about food sovereignty and food security. The food security situation in Mali is untenable, one third of Malian children under the age of five are chronically malnourished (Oakland Institute, 2011a: 5-6; Adamczewski, Jasmin and Tonneau, 2011). Hoping to solve the problems of food insecurity, Mali has adopted two contrasting policies. Firstly, it has sought and welcomed foreign direct investment in agriculture and lands. Secondly, similar to countries such as Ecuador, Bolivia, Nepal, Nicaragua and Venezuela, Mali has adopted food sovereignty as a principle in its constitution and it has been hailed publicly for this approach (Pachón-Ariza, 2013: 363; ICRISAT, 2015; Clayton, 2012: 42).

This chapter argues that, land grabs in Mali, a product of the collusion between multinational cooperation's and the Malian government render the attainment of food sovereignty impossible. This is because land grabs limit the peasants' access to land; it results in the reallocation of the water resources needed to cultivate land and finally, land grabs foster environmental degradation which make future food security impossible.

Access to Land

Land is a primary source of wealth in any nation (Abebe, 2012: 879). Through the conservative and conscientious exploitation of land, prosperity and development follows, this belief led Borras and

Franco (2013) to assert that ‘one needs to control land in order to capture water, in order to extract subsoil resources...’ (Borras and Franco, 2013: 1726). The inability to exploit one’s environmental resources leads to poverty and consequently underdevelopment reflected in the era of the transatlantic slave trade in which a valuable human resource was grabbed and the impoverishment of a rich continent followed. Presently, in this century, the exploitation of this land resource by the indigenous people is prevented once again: what is grabbed is not human resource but the significant resource that is land.

Guiding this process of systemic underdevelopment of Mali are the neoliberal institutions such as the World Bank which has overseen the creation of various agencies and initiatives in Mali such as Mali Investment Climate Program (MICP), Mali’s Investment Promotion Agency (API) and the Presidential Investment Council (CPI) that would easily facilitate land grabs (Djiré, Kéita and Diawara, 2012a: 33; Oakland Institute, 2011a: 9; Adamczewski, Jasmin and Tonneau, 2011; Borras and Franco, 2010: 508). The consequence is the inevitable and alarming increase in the rate of multinational corporations’ land grabs in Mali. Prior to the creation of those initiatives, 2004-2009, only 871,267 ha was grabbed. After the establishment of the initiatives, 544,567 hectares were grabbed in 2010 alone (Djiré, Kéita and Diawara, 2012b: 8; Oakland Institute, 2014: 1).

Dispossession, Relocation and the Process of De-peasantisation

The immediate consequence of these grabs is the dispossession of land from the peasants (LaFrancesca, 2013: 92). Singled out as an example is the SoSuMar project which resulted in the dispossession and displacement of 1,644 villagers (Oakland Institute, 2011a: 24). As at 2010 when the Oakland Institutions report was written, over 540,000 ha had been grabbed in Mali or were about to. Of that number, over 370,000 ha were for foreign transnational corporations. Putting it into the context of dispossession, the area taken had the potential of sustaining over 112,537 African farm families, or over half a million people (686,478) (Oakland Institute, 2011a: 39).

The forceful relocation of these dispossessed and displaced African farmers was not accompanied by any compensation from the foreign corporations. Provisions in the land grabs make accountability and subsequent compensation by the land grabbing “investors” impossible (Narula, 2013: 104; Baumgart, 2011: 11; Adamczewski, Jasmin and Tonneau, 2011).

Using the deal between Mali and Malibya as an example, Malibya – a private “investor” grabbed 100,000 ha of land. It should be noted that the 100,000-ha land taken over by Malibya was at the time populated by over 75,000 people. The Malibya arrogated the right to dispossess, displace and harm thousands without fear of reprimand and government sanctions (Centre for Human Rights and Global Justice, 2010: 98; Diallo and Mushinzimana, 2009: 28).

In the face of these land grabs and the parallel vice of no compensation, the logical solution would be the contestations of these land grabs and the forceful relocation that subsequently occurs. However, in Mali, formal land titles are non-existent for Africans. Land and natural resources have historically been considered as state property yet the state has recently started disregarding African farmers such that the land in Mali is increasingly becoming transnational corporations and foreign governments’ property. Therefore, the government has a prerogative over land issues regardless of the rights of the existing African occupants; an attitude which derives from the colonial era (Deininger, Byerlee, Lindsay, Norton, Selod and Stickler, 2011: 99; Djiré, 2007: 1).

This makes the attainment of redress (restitution, reclamation or compensation) impossible under Malian law as customary rights which are predominant in Mali are not accepted or recognised by the Malian government (Narula, 2013: 104-105; Baumgart, 2011: 11). The fact is, land titles are extremely rare, so much so that, ‘only between 2 and 10% of the land, mainly urban, is held under formal land tenure’ (Cuffaro and Hallam, 2011: 6).

The fact that most of the land grabs in Mali take place at the Office du Niger zone, which is essentially government owned, proves that foreign transnational corporations have realised that the situation in Mali is advantageous for them (Abebe, 2012: 878; White, Borrás, Hall, Scoones and Wolford, 2012: 19; Deininger, Byerlee,

Lindsay, Norton, Selod and Stickler, 2011: 55; Centre for Human Rights and Global Justice, 2010: 99).

The case of SamanaDugu where the inhabitants lost their land exemplifies the dangers inherent in a situation in which there is a lack of formal land rights for Africans. Having been accused of installing themselves on the land and having failed to prove their rightful claim to the land as a result of marginalisation of customary rights, the foreign “investors” from Moulin Moderne were given land in Samana Dugu. Uprisings resulting from the forceful reallocation of the land were subsequently quelled (Oakland Institute, 2011a: 29, 30). Thus, the case of Samana Dugu is reflective of the land grabbing situation in Mali. Indigenous people including peasants are moved out of their native lands without any respect to cultural rights and historical rights. History, including cultures of Africans, is being destroyed (Araya and Hofisi, 2012: 12)

One can therefore appreciate that the land tenure reforms, aided by the World Bank, that occurred in post-independence African states had great ramifications. The land tenure reforms gave the Malian government control over all lands in the state unless the land was owned and formally titled to an individual. Thus, some African governments with the help of the World Bank systematically worked for the dispossession and impoverishment of African peasants (McMichael, 2011: 6). This chapter argues that these reforms were therefore a characteristic and systematic facet of the larger process of capitalist dispossession and accumulation aimed at further impoverishing the African continent.

Implications of Dispossession and Forceful Relocation

Land grabs contravene the human right to property as well as dignity. If secured, ‘rights to property provide an important foundation for an economically vibrant society’. Thus, in countries where African property rights are secure, there is significant economic growth and prosperity within its population. In these countries, the governments do not facilitate the dispossession and dislocation of African peasants (Boudreaux and Aligica, 2007: 23). The implication is that the immediate consequence of land grabs is a loss of African developmental potential.

A further implication of the dispossession, dislocation and relocation of the African smallholder farmers and peasants is that they lose not only their immediate income but also insurance against malnutrition (Narula, 2013: 104; GRAIN, 2012: 2; Diallo and Mushinzimana, 2009: 21; The Transnational Institute, 2012: 5; Deininger and Binswanger, 1999: 256). This is because land 'reduces the dependency of the household on market prices for food commodities; it acts as a buffer against economic shocks' (de Schutter, 2013: 8).

Apart from the effects which land grabbing has on food production; the livelihood of the rural population is also affected. The limited, temporary jobs offered with unfavourable terms and low wages are not sufficient to compensate for the number of people who have lost their traditional source of income as they are rendered unemployed (Narula, 2013: 104; Diallo and Mushinzimana, 2009: 27). The above led Fonjong and Fokum (2015: 115) to ask the very important question: 'Can sixty or a hundred or even five hundred low-paid unskilled jobs created by these companies be equated to hundreds of thousands of villages eternally displaced from their primary source of livelihood and sometimes done without due informed consent and inadequate compensation?'.

It should be noted also that this loss of livelihoods does not only affect the immediate owners but has a great impact on the future generations of African smallholder farmers (GRAIN, 2012: 1). Emphasizing this are Moussa Djiré and Amadou Kéita, who both stated in a 2010 report that these land grabs are a 'big risk for land security of African rural agricultural producers and seriously mortgages the future for generations to come' (Oakland Institute, 2011a: 24). This loss of livelihoods by African smallholder farmers results in poverty. Thus, irrespective of abundant production and importation of food in Mali, the people that need it most (peasants) cannot access it regardless of availability (Mbunda, 2013: 2).

One of the most important implications of these land grabs is with respect to the gender impact. Women farmers are 'the operatives and custodians of food and the food system' and so food security through food sovereignty cannot be delinked from gender rights, entitlements and outcomes (Akanji, 2013: 6; Park, White and Julia,

2013: 1). Female employment in agriculture is about 40% in sub-Saharan Africa, it is about 55% in South East Asia about 25% in Latin America and the Caribbean (Akanji, 2013: 7).

Irrespective of the fact that peasant women farmers form the majority of the African smallholder farmers and they are the majority of the world's food providers and producers, they face the greatest challenges. Their rights are easily abused, refuted or curtailed by the Malian government or the community in which they reside. Furthermore, they lack capital or the ability to obtain credit. They end up losing their land and end up working on other farmlands (Spielfeld and Sophia, 2009: 47). What is occurring in Mali as a result of the land grabbing is the de-feminisation of agriculture (Akanji, 2013: 6).

The Development Narrative and the Unwarranted Defence of Land Grabs

Several arguments are consistently repeated in favour of land grabs by the proponents of this practice. *Firstly*, in line with their *modus operandi*, these “investors” and their ideological godfathers and supporters, the World Bank and International Monetary Fund (IMF), have consistently offered the economic developmental narrative as a justification for the rampant dispossession of land and the subsequent de-peasantisation in Mali (McMichael and Schneider, 2011: 124).

It is ironic that while professing that land grabs would bring development to the peasant community; these land grabs in fact undermine their right to development. The Declaration on the Right to Development states that ‘the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in [and] contribute to [,] and enjoy economic, social, cultural, and political development [,] in which all human rights and fundamental freedoms can be fully realised’ (United Nations, 1986). In Mali, it is only through the access to land that the development of the rural communities can be guaranteed: the communities’ livelihoods are inextricably linked to access to land (Abebe, 2012: 881).

Secondly, the supporters of land grabs argue that large scale farms enjoy comparative advantage in the globalised economy and this is

the pathway to a successful export economy (Rosset and Martinez-Torres, 2013: 3; White, Borras, Hall, Scoones and Welford, 2012: 7; The Transnational Institute, 2012: 5). Considering the fact that Mali aims to be a major exporter of agricultural produce, this argument is persuasive. However, the risks should not be ignored. Once these “deals” are agreed on, the farmlands that are grabbed become connected to global financial markets. Thus, they are now ‘subject to the vicissitudes of far-off markets’, meaning that situations in the global financial markets will impact these farmlands and in turn affect the indigenous workers with respect to their wages (Araya and Hofisi, 2012: 13).

Thirdly, the champions of land grabbing also point to the availability of arable “empty”, “idle”, “underused” and “underutilised” lands in Mali. Their argument rests on the premise that while there is “available” land, the Malian government lacks the capital to develop these lands: the problem with this argument is that the Westerners forget that they are the ones that have incapacitated Africa for centuries. Mali’s rural land could be estimated to be about 46.6 million ha, of which 12 million hectares are arable lands. However, the disadvantage of inadequate capital, symptomatic of Mali’s state of underdevelopment and poverty caused by centuries of enslavement, colonialism and resource dispossession by the colonialists, has severely limited Mali’s ability to pursue agricultural modernisation (Djiré, Kéita and Diawara, 2012b: 16; Narula, 2013: 117; Asafa, 2015: 75; Ojo, 2015: 107).

As at 2009, revenue from just seven large-scale land grabs was put at US \$292 million, thus affirming the revenue potential of large scale land “investments” (Centre for Human Rights and Global Justice, 2010: 97; Abebe, 2012: 877). While the Malian government strives to attract foreign “investments”, it is necessary to note that transnational corporations evade paying taxes to African governments; for this reason the transnational corporations are not strictly speaking investments, but liabilities, for Africa. The Malian government hopes that the transnational corporations will provide a source of capital, technology, know-how, infrastructure development and market access, and potentially act as catalyst for economic

development in rural areas (Djiré, Kéita and Diawara, 2012b: 20; McMichael, 2011: 5).

Irrespective of the persuasiveness of the above narrative, the fact remains that the argument supporting land grabs is short-sighted. “Empty”, “idle”, “unused”, “wastelands”, or “under-utilised” lands are rare, as described. These lands could serve agricultural and nonagricultural purposes: such as small-scale farm production, for fuel, medicines, dietary diversity including fallowing to manage soil fertility, pastoralism as well as shifting cultivation (White, Borras, Hall, Scoones and Wolford, 2012: 14; Vhugen, 2012: 7; McMichael, 2011: 3).

Importantly, this argument by the proponents of land grabs which state that “investors” only seek idle and marginal lands is unacceptable and outright hypocritical (Araya, 2013: 20). It betrays the true character of these “investors”. “Investments” in land can only occur if these “investors” are guaranteed of ‘potentially higher returns that come from agricultural production itself’ (Fairbairn, 2013: 7). Thus, it stands to reason that these “investors” would not “invest” in marginal lands without productive potential and this reveals that that argument holds no water.

Alternatively, if the Malian government is seeking “investments” in agriculture, it should do so itself or through the small and family African farmers. It can be achieved if there is land tenure security. Nineteenth century scholar David Low (1844: 9) supported this notion, he believed that without tenure security, there is little the farmer can hope to achieve. Land titling is advantageous as it will enable the farmers’ access to credit and loans which shall serve as necessities if he is to invest in the land. This is more citizen inclusive and acceptable (Araya, 2013: 17).

Fourthly, the proponents of large scale land grabs predict that during the period of investment; there will be openings for a lot of jobs. However, it is necessary to note that transnational corporations are increasingly employing humanoid robots rather than human beings (Nhemachena, 2017). Those that hope that employment will be created for human beings erroneously think that money will inevitably be generated within the local community and help the lives of the locals (Diallo and Mushinzimana, 2009: 27). Illustrating this,

Markala Sugar Project by SoSuMar, CaneCo and CommCobrought created 5,000 direct and 20,000 indirect jobs, hence higher household incomes, food security (as income will allow to buy food throughout the year) and better living conditions (Diallo and Mushinzimana, 2009: 23). However, to be dependent on employment in transnational corporations businesses amount to enslavement, without ownership of the means of production.

It is posited that the creation of jobs is also complemented by the construction of infrastructure which would be beneficial to the local community. The problem in this argument is that transnational corporations build infrastructure not necessarily or not principally for the benefit of local communities, who merely constitute an ancillary group for capitalism. The roads, dams and so on that are constructed are mainly for purposes of facilitating exploitation and exportation or siphoning off, to global markets, of African resources. The Malibya “investment” undertook the construction of roads which is considered by some to be useful for the locals’ improves movement (Diallo and Mushinzimana, 2009: 27). However, it should be pointed out that these roads will potentially negatively affect certain aspects of their culture and transhumance paths. While arguments exist pointing to the potential job creation by these investments, the fact that needs to be acknowledged is that there are certain disadvantages and limitations associated with it (Djiré, Kéita and Diawara, 2012b: 7).

Gibbon (2011), while acknowledging the fact that in large scale farms employment occurs, he also acknowledges that the employment opportunities are limited and the jobs are of a low quality. Limited employment is not inherent to large scale investments and is dependent on the crop planted, however an ever-common feature of large scale investments is the low job quality (Gibbon, 2011: 45; Deininger, Byerlee, Lindsay, Norton, Selod and Stickler, 2011: 38). The Transnational Institute (2012) asserts that the arguments that highlight the employment creating potential of land grabs are not proven because of the lack of evidence proving the claims. White, Borras, Hall, Scoones and Wolford (2012) add that there is the possibility that claims on job creation are exaggerated (White, Borras, Hall, Scoones and Wolford, 2012: 15).

Finally, the proponents of the large-scale land grabbing reject the notion that these land grabs are a direct affront on food sovereignty. They believe ‘that if carefully disciplined and appropriately regulated, large-scale land grabs can achieve win-win outcomes for both the “investor” and host populations’. Regulation can be achieved through a continued facilitation of an appropriate “investment” climate and adherence to a set of “good governance” principles (Narula, 2013 108; White, Borras, Hall, Scoones and Wolford, 2012: 18). Hence, the World Bank, FAO, UNCTAD and IFAD (2010) have proposed a set of principles for ‘responsible’ land “investments” called seven ‘Principles for Responsible Agro-Investment’ (RAI) (World Bank, 2010, x, 68-91).

With respect to the establishment of principles to govern the large-scale land grabs, Borras and Franco consider them as merely corporate ‘extreme makeover’ done in response to public and activist criticism (Borras and Franco, 2012: 35). White, Borras, Hall, Scoones and Wolford (2012) pose the questions ‘will these make any difference at all? Why should we expect corporate agribusiness to act on a basis of voluntary corporate ‘social responsibility’?’ These are necessary questions as the creators of the RAI principles forgot that these corporations are primarily profit oriented and they are accountable to their shareholders in the home nation [overseas], therefore, any other form of accountability brought about by those principles that would prevent the achievement of their primary aim will not be tolerated (White, Borras, Hall, Scoones and Wolford, 2012: 18).

The fact is that where these principles come from does not matter. What matters is that these mechanisms are not enough; they fail essentially because they are not self-implementing or self-interpreting. With this or a form of social pressure, there would not be a favourable result. Thus, although the creation of principles to govern the conduct of foreign investors may be theoretically correct, practically, it is not feasible (Borras and Franco, 2010: 510).

The Water Resource Dimension of Land Grabs: Water Grabbing

The impossibility of separating water from any farming systems reflects the importance of the water resource to the success of any food system (Hall, 2015: 1). Water resources be it blue or green water ‘form the bedrock of our agricultural productivity: all of our farmland crops depend on a guaranteed supply of water, be it from rainfall or irrigation’ for moisture in the land (Skinner and Cotula, 2011: 1; Woodhouse and Ganho, 2011). Not only is it a factor of production, but it is the basis of the livelihood (it is natural capital) of the African farmers of Mali, farmers that work towards the achievement of food sovereignty (Cotula, 2008: 21, 59; TNI, 2014: 20; MIJARC, 2010: 11).

Thus, it can be inferred that a change in the circumstances of water resources will largely affect land usage and the productive potential of the land. Without water, food sovereignty is impossible to achieve as the deprivation of water from smallholder farmers causes them to lose an important basis for food production (Taylor, 2015: 4; Fonjong and Fokum, 2015: 117). Therefore, the unsustainable usage, mismanagement and deprivation of these water resources may make it difficult for food sovereignty to be achieved and lead to subsequent food insecurity (Pimbert, Barry, Berson, Tran-Thanh, 2010: 12; Akram-Lodhi, 2013: 3).

The umbrella term that shall be used to connote the unsustainable usage and mismanagement of water resources in Mali, which occurs as a result of the transfer or reallocation of said resource in consequence to land grabs, is water grabbing.

Water grabbing can be defined:

as a situation where powerful actors are able to take control of, or reallocate to their own benefits, water resources already used by local communities or feeding aquatic ecosystems on which their livelihoods are based. (Mehta, Veldwisch and Franco, 2012: 197)

Connotatively, it entails the dispossession, deprivation and subsequent ecological destruction due to the great strain that water grabbing puts on the available water resource (Fonjong and Fokum,

2015: 115). In other words, water grabbing can be seen as the process whereby water deficit states seek to correspondingly relieve pressure on their domestic water resource and achieve food security by taking control of or reallocating to their own benefit water resources of another state.

These water deficit countries include states that are expanding rapidly (India and China) and states with non-renewable water resource but with sufficient capital (Gulf States – Saudi Arabia) (TNI, 2014: 8; Woodhouse and Ganho, 2011: 1; Schoneveld, 2011: 1; Friis and Reenberg, 2010: 15). This transformation of water, from an openly available resource to a commodity negotiated and paid for, is not new. According to Kay and Franco (2012: 2), it ‘has much in common with earlier resource grabs and what has been called the “enclosures of the common”’.

In comparison to land grabs, the implications of water grabbing are inherently difficult to grasp. *Firstly*, the fluid nature of water and its hydrologic complexity often obscure how water grabbing takes place and what the associated impacts on the environment and diverse social groups are’ (Hall, 2015: 11; Mehta, Veldwisch and Franco, 2012: xx).

Secondly, this difficulty in comprehending or accepting the implication of this practice is rooted in the false and insidious belief about the infinite nature of the water resource. It is often described as ‘abundant’ and ‘unused’ (Mehta, Veldwisch and Franco, 2012: 196). This was reflected during the Malian government’s call for “investors” in 2008 in which it employed a language which suggested unlimited water resources (Hertzog, Adamczewski, Molle, Poussin and Jamin, 2012: 313). *Thirdly*, it is less known because when land grab is discussed, water is added to the discussion as a mere addendum. When being studied also, the issue of water grabbing has mostly been considered in relation to land grabbing and thus it is subdued in the broader discourse. Taylor (2015: 4) states that “water was often viewed as an ‘input’, in the same vein as fertiliser or pesticides”.

However, water grabs are as important as land grabs and hold greater significance because occasionally, they form the intention of the initial land grab. Most land grabs are just a pretext to control the

water resource of an area and thus are the most valuable part of any deal (Mehta, Veldwisch and Franco, 2012: 194, 197; Thaler, 2013: 2; Oakland Institute, 2011b: 1; Kay and Franco, 2012: 7). Smaller and Mann (2009: 5) go further and consider water as not only a desire of the initial grab but on par with the financial and food crisis as factors that are driving the recent surge of investment.

Water Grabbing in Mali and the Rhetoric of an Infinite Water Supply

In contrast to land grabbing in Mali, water grabbing does not proceed from contracts drawn or agreed upon as the process of the transfer of water rights is hardly ever formalised. Water grabbing stems from a lack of interest or concern, by the Malian government, with respect to the state's water resource. Water is just a tool which the Malian government uses to attract foreign "investors" who they hope will "invest" in land thus the water governance situation in Mali is lax (Baumgart, 2011: 13).

Water governance can be defined as 'the range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services at different levels of society' (Rogers and Hall, 2003: 16). The government of Mali fails to place any strict restrictions or install any form of water management scheme which is needed for Malian agriculture in order to compensate for the irregular and unpredictable rainfall (Woodhouse and Ganho, 2011: 9). As a result of the perceived infinite nature of the water resource, water becomes nothing more than an offering or gift to make negotiations for land grabs go smoother after all 'global capital doles out the goodies to those who offer the best incentives in terms of tax exemptions, subsidised provision of natural resources like land and water, and the like'. (Fonjong and Fokum, 2015: 115; Basu, 2007: 1281; Fairbairn, 2013: 11; Kay and Franco, 2012: 7).

This unhindered transfer of water rights to foreigners resulting in their unlimited access to water such as the deals with companies like SOSUMAR and CaneCo become a normality (Djiré, Kéita and Diawara, 2012b: 60). Contracts drawn up with respect to land grabs often do not contain any provision regarding water use (Fonjong and Fokum, 2015: 115; Broughton, 2013: 26).

The justification for not mentioning any reference to water in land grabs rests on the notion that water regulations in contracts will restrict the activities of the “investors” which will in turn prevent their effectiveness (Fonjong and Fokum, 2015: 118; Skinner and Cotula, 2011: 2; Cotula, 2015: 30). However, there is an exemption in Mali where an “investor” signed a contract where there is a commitment by the “investor” to pay water fees higher than those paid by the locals (Karlsson, 2012: 11). Nevertheless, that situation rarely occurs.

Even when water use is mentioned in contracts, the contract terms agreed upon do not reflect the importance of this resource. The Malian government sets lax and ineffective water usage guidelines and the government charges little fees for water usage. In comparison, the peasant farms are subject to certain demands such as water fees and may be evicted if fees are not paid (Adamczewski, Jasmin and Tonneau, 2011). An agreement between a Chinese firm and Malian government stated that the company would pay about 2,000 FCFA/ha (i.e. 3 €) in comparison to 67,000 FCFA/ha (i.e. 100 €) paid by African family farmers who crop rice (Hertzog, Adamczewski, Molle, Poussin and Jamin, 2012: 314).

A further example of a weak water usage provision in contracts is with regards to Malibya. The water usage of Malibya is only restricted during the months when the river flow is low. The justification is that these companies spent money to develop the land, to dig canals, and to maintain infrastructure. A further justification given is that the Malian government does not want to charge fees that may hamper the progress of the “investments” or projects (Djiré, Kéita and Diawara, 2012b: 60). Although such a rationalisation can be accepted, the fact is that the interest of foreign private “investors” should not be preeminent in relation to the interests of the African rural population.

In lieu of inserting effective water use regulations in land lease contracts, the Malian government has gone further in its charm offensive by inserting in these contracts the provision which states that Mali will be responsible for ensuring constant supply of water. Under Article 8 of the Malibya agreement, Mali promised unrestricted access to water during the rainy season and provision of

sufficient water supply through the Macina canal for Malibya during the low water period (Oakland Institute, 2011a: 27-28; Oakland Institute, 2011b: 2; Djiré, Kéita and Diawara, 2012a: 36). In addition, “investors” such as Malibya in Mali have grabbed land on the promise that water infrastructure will be built by the Malian government (TNI, 2014: 13; Skinner and Cotula, 2011: 2). True to that promise, a 40-km long irrigation canal was constructed upstream by Mali on the Niger River to service the lands for the Malibya “investment”. The irrigation capacity will be four billion cubic meters per year. Putting into context the sheer size and implication of this plan is the fact that 3.5 billion cubic meters of water a year is used to service the seventeen million population of Beijing and its industries (Oakland Institute, 2011b: 2).

The above thus encapsulates the situation of water grabbing in Mali. Water is stripped of its value as a precious natural resource and assumes the role of a mere tool and bargaining chip to please potential “investors”. By taking such actions that favour the foreign parties over the Malian population, the Malian government is failing in its social function of protecting the citizens because it trivialises their precious resource of water.

Water Grab for Developmental Opportunities

An obvious argument that rationalises this spate of water grabbing is hinged on the narrative regarding the underutilised nature of the water resource and the possibility for “investments” to ‘unlock’ its potential. This is the view on Mali, it is considered as a country with so much abundant water resources but without the economic and financial capacity to exploit these resources (Mehta, Veldwisch and Franco, 2012: 200).

This chapter acknowledges that the claim with respect to abundance and underutilised water resources may be true as it has been substantiated by several sources. The World Bank claims that the continent of Africa ‘has more than half of the world’s uncultivated but agriculturally suitable land and has scarcely utilised its extensive water resources’ (Oakland Institute, 2014: 6). Furthermore, Ambalam (2014) points out that only 3.8% of Africa’s surface and groundwater is harnessed or is exploited (2014: 125).

Smaller and Mann (2009) state that Sub-Saharan Africa uses only two per cent of its freshwater resources for irrigation therefore, private investors consider the region as having great potentiality for irrigated agriculture (2009: 5).

Accounting for this failure to exploit and harness available water resources is the inherent lack of funds that haunts many African states as well as Mali. More importantly the incapacity of Africa is traceable to the enslavement and colonisation of the continent that has been ravaged for centuries without restitution or reclamation. The Malian as well as other African governments unshrewdly consider “foreign direct investment” as an alternative source of revenue for the funding of agricultural initiatives. These foreign “investments” are noted as having accounted for increased irrigation and water infrastructure in Mali (Quick and Woodhouse, 2014: 4). The argument therefore is that the efficient exploitation of Mali’s water resource will lead to sufficient water supply which will result in the success of commercial operations which will in turn benefit Mali through the provision of employment and boosting of agricultural productivity. Nevertheless, this argument ignores the reality that the situation of most African countries shows water scarcity and not the other way around (GRAIN, 2012: 3).

Furthermore, in defence of the transfer of water rights, scholars have noted the conservative and conscientious use of water resource employed by these foreign “investors”. There is evidence that the “investors”, after realising the detrimental nature of their water usage and the diminishing nature of the water resource, adopt several strategies and means for water conservation. Technical options have been considered by these “investors”, which include: ‘sprinkler irrigation, to reduce water consumption at field level by using pumps to mobilise water from primary or secondary canals’ (Hertzog, Adamczewski, Molle, Poussin and Jamin, 2012: 314).

Accompanying the technical options for water management, these “investors” employ nontechnical means such as planting *Jatropha* which is a non-edible plant for biofuel. The reason for planting *Jatropha* is that it uses a considerable low amount of water. Further, suggestions have been made that the existence of this crop is an opportunity for African small scale farmers to gain a foothold

in the market. Nevertheless, it has been also indicated that the growing of *jatropha* for the commercial export level demands good soil and unlimited access to water (Woodhouse and Ganho, 2011: 9).

It can also be argued that according to law, the private “investors” are not doing any wrong. While international law does not give right for any foreign “investor” to “invest” in a sovereign state, the domestic laws of most countries allow this (Smaller and Mann, 2009: 14).

The Impact of Water Grabbing

While this chapter acknowledges the fact that the “investments” in water usage are potentially beneficial to the population through infrastructural development, employment, increase in public revenue, and improved farmers’ access to technology and credit, however, these should not occur at the expense of the local population’s freedom. The right to the water resource should not be compromised (OECD, 2010: 16). If it is compromised, great ramifications abound such as ecological destruction, accelerating processes of desertification, depletion of fisheries, famine and so on. (TNI, 2012: 3)

At this stage, there arises the problem of ascertaining the impact of this water grab on the indigenous population. One way of measuring the impact will be through an estimation of the volume of water used in relation to the land grabbed. However, although water grabs and land grabs occur simultaneously, the impact and the extent of the water grab are not always proportional (TNI, 2014: 14). While land is fixed, water is fluid and far reaching therefore the impacts water grabbing or water appropriation have been more far-reaching and threatening (Franco, Mehta and Veldwisch, 2013: 1). Simply put, the extent of the water use can go beyond the existing land grab.

There are two reasons for the disproportionality; the *first* has to do with the nature of crops being grown. The choice of crops grown by the “investors” utilises large volumes of blue (irrigation) and green (rainfall) water. These crops also have a long growing season and so will require water for long periods of time (Woodhouse and Ganho, 2011: 9). As at 2012, Hertzog, Adamczewski, Molle, Poussin and Jamin (2012) reported the allocation of over 40,000 ha of land to two

large investors for the cultivation of sugar cane alone. As sugar cane is a perennial crop, it will increase the demand for water all year round (2012: 313).

Secondly, the disproportionality of water grabs in Mali can be attributed to the Malian government. While a land grab is limited to specific hectares of lands, the Malian government exercises its right as codified in the 2002 Water Code (Law No. 02-006) to allocate water to irrigate land that is grabbed by foreign investors (LANDac, 2012: 6). It has given a directive that the “investors” have unlimited access to water from the Niger River.

The impact of this water grab is felt by the existing users, it includes ‘reduced surface flows downstream due to upstream water abstraction, or changing groundwater levels’ (Skinner and Cotula, 2011: 2). The grabbing of land by two companies Moulin Moderne du Mali and Malibya stands at over 120,000 ha of land as at 2010. The extraction of 4 million cubic meters of water per annum affected millions of people downstream (Fonjong and Fokum, 2015: 116). The canal built by Malibya which is the largest in Sub-Saharan Africa threatens the water situation in Mali. The new canal has the capacity for 11m cubic meters a day or 4bn cubic meters a year. This is twice the capacity of any canal in the region and thus neighbouring lands may be deprived of water and this has more implications since Malibya has priority access to water (Bunting, 2010). Apart from the volume, the quality of water remaining for the local population is also affected (Rulli, Savori and D’Odorico, 2012: 1). The implication or the impacts are an affront on the basic human rights to water, to food, to health, to work and to self-determination (TNI, 2014: 20). However, the greatest harm is on the achievement of food sovereignty.

Water grabbing will naturally cause unforeseen but disproportionate damage to existing African small-scale production systems (Quick and Woodhouse, 2014: 5). The African smallholder farmers will lose their secure access to water used for irrigation and other agricultural purposes (Mehta, Veldwisch and Franco, 2012: 202) and these farming communities in the area will suffer decreased agricultural productivity (GRAIN, 2012: 3,7). What is alarming as Rulli Savori and D’Odorico (2012) note is that the ‘per capita volume

of grabbed water often exceeds the water requirements for a balanced diet and would be sufficient to improve food security and abate malnourishment in the grabbed countries' (2012: 1).

The resources which are readily and easily taken are a lifeline for the smallholder farmers, due to the nature of the lands in which they occupy, they already lack sufficient water supply and have consistently adapted their farming techniques in the face of the fluctuations in the season. The smallholder farmers are more efficient in their use of water, but they are not rewarded for this (De Schutter, 2011: 546)

Land Grabs: A Threat to Environmental Sustainability and Biodiversity

The third way through which land grabs threaten the possibility of food sovereignty in Mali is by the decimation of otherwise arable land due to modernised but anti-ecological agricultural techniques such as the destructive Monsanto herbicides and pesticides, including "terminator seeds". Land for agricultural purposes is crucial, not just now but for the future in order to feed the growing population of the earth estimated to reach 9 billion by 2050 (Capone, Bilali, Debs, Cardone and Driouech, 2014: 13; Stefanis, 2014: 69).

The pedestal on which agriculture finds itself dictates that every measure, needed to ensure not only increased agricultural productivity but sustainability, should be adopted. It would be expected that agriculture and all it encompasses will be revered and respected; however, the reality is different. The persistent scourge of land grabbing and its attendant measures to harness the land resource necessary for agricultural productivity is actually exploiting, abusing and degrading Mali's arable land.

The Unviability of Industrial Agriculture

The industrial model of agriculture characterised by 'large-scale monocultures of transgenic crops' and the use of high yielding crop techniques is a threat to food sovereignty as it undermines nature's capacity to sustain food production in Mali. The intensification of agricultural methods associated with agri-business and the large scale

farms is evidenced by the use of high-yielding crop varieties, fertilisation, irrigation and pesticides. These aspects impact heavily on natural resources with serious health and environmental implications. This issue is rarely discussed as it is not classified as ‘a politically urgent issue’ and so there is little attempt at implementing Environmental and Social Impact Assessments (ESIA) which is essentially meant to determine the long-term consequences of these land grabs (Altieri and Toledo, 2011: 590; Balehegn, 2015; Altieri, 2012: 2; Oakland, 2011a: 37; Deininger, Byerlee, Lindsay, Norton, Selod and Stickler, 2011: 57).

The short-term gains of high yields are counteracted by the potential dangers. Implications of these agricultural methods include: increased water shortage in Mali due to the depletion of fresh water resources (Balehegn, 2015; Fonjong and Fokum, 2015: 115). Furthermore, the use of chemical fertilisers leads to a ‘decoupling of the carbon and nitrogen cycles started, which is disastrous for soil life’. The implication is seen when it is realised that organic carbon is the basis of the normal ecological nutrient situation. Bacteria need carbon to process the nitrogen and when this is lacking, they end up using the carbon from their own polysaccharide layer which can lead to a damaged soil structure (Donkers, 2014: 92). Residues of pesticides get to groundwater, they increase soil erosion, reduce biodiversity and this hampers soil fertility (Fitzpatrick, 2015: 20; TNI, 2014: 22).

In defence of Industrialised Agriculture

There are groups who believe that the methods employed in large scale farms are justifiable. Proponents assert that harm inflicted upon the environment as a result of agricultural techniques was not deliberate. In reply, this chapter would argue that the stated counterargument is exactly the problem of transnational industrialised agriculture. This reflects the thought process of these foreign “investors”. They hardly ever consider the potential demerits of their actions rather they move on with whatever method is quicker to earn them profits. These large-scale “investors” employ a one size fits all model of agricultural production (Fitzpatrick, 2015: 20).

Furthermore, the advocates of land grabbing further justify their methods such as the use of monocultures in mega-farms and genetic modified organisms (GMOs). According to them, industrialised agriculture arises and works to address the challenges of food security in Africa (Martiniello, 2013: 14; Donkers, 2014: 91; Vhugen, 2012: 8). This persuasive narrative contradicts itself. While it is agreeable that industrialised agriculture leads to high yields, however it does not guarantee food security and it does not guarantee food safety either. Food security is not merely the direct access to food. Food security is seen as a continuous process of food provision that can sustain a steady expansion of food consumption while remaining nutritionally and culturally relevant and acceptable (FAO, 2006: 1). With this in mind, it can thus be deduced that rather than food security, GMOs aggravate insecurities and food poisoning. GMOs have been proven to cause health challenges in Africa ranging from cancer to sterility, impotence and they induce hormones for homosexuality (Nhemachena and Mawere, 2017).

While still justifying their agricultural methods and techniques, these foreign “investors” criticise traditional farming methods. These critics would point to the unproductive and economically inefficient nature of African smallholder agriculture in Mali (Timbo, 2015: 11). They highlight that the knowledge intensive method and practices nourished by ancient agricultural management wisdom employed by the African peasant farmers in lieu of more input intensive techniques is not always effective or applicable (Altieri, 2012: 5). As these foreign “investors” hammer on the perceived weakness of smallholder farming, they fail to acknowledge certain facts with respect to African smallholder farmer productivity.

Firstly, African small and family farms only produce ineffectively when they are hampered by both government policies which favour large farms and the difficulty in acquiring capital (Deininger, Byerlee, Lindsay, Norton, Selod and Stickler, 2011: 29). The small farms, if unhindered, are effective irrespective of farm size. There is a reason why the average size of peasant farmers is small. According to Deininger, Byerlee, Lindsay, Norton, Selod and Stickler (Ibid) , ‘the main reason is the spatial dispersion of production, which requires

flexibility and an ability to quickly adjust to micro-variations in climate or soil conditions’..

Secondly, in peasant farming systems, there is the feature of a high degree of plant diversity or polycultures. This method minimises risks and is rewarded by yield stability, diet diversity, nutrient-enriching plants, nitrogen-fixing and nitrogen-decomposing bacteria, and a variety of other organisms that perform various beneficial ecological functions (Altieri and Toledo, 2011: 591). These diversified farming systems promote biodiversity and environmental sustainability especially in areas which experience severe climate change and environmental fluctuations (Altieri, 2012: 5). Despite these shortcomings and environmental difficulties, the smallholder farmers have always adapted to such situations and it is a testament to their development agriculturally that the agriculture sector is a dominant sector in Mali’s economy accounting for over 35 percent of its GDP, it is also the main export earner bringing in over 75 percent of the export earnings (Centre for Human Rights and Global Justice, 2010: 85; Butt, McCarl, Angerer, Dyke and Stuth, 2003: 4). The Malian small and family farmers minimise crop failure in difficult climatic conditions through increased use of drought tolerant local varieties, water harvesting, mixed cropping, agroforestry, soil conservation practices and a series of other traditional techniques (Altieri and Toledo, 2011: 596)

In Mali, in lieu of the chemical pesticides, there are certain alternatives which have been used for the eradication of pests. One such method is the Integrated Pest Management (IPM) which ‘involves using a combination of biological controls (natural predators for pests), modified farming techniques (modifying irrigation practices), and mechanical controls (using physical traps or barriers for pests), to help manage pests and reduce the use of pesticides – which are only used as a last resort’ (Fitzpatrick, 2015: 23). In Mali, a parasitic wasp has been used in the control of pests (Fitzpatrick, 2015: 23). In Mali also, farmers that were trained in IPM techniques include 11,000 rice farmers who were trained between 2001 and 2009. The farmers trained in these measures were able to outstandingly increase yields by 41% compared to conventional

production methods and reduced pesticide use by 94% (Fitzpatrick, 2015: 23).

These principles used by the farmers employ better use of resources in order to ensure resource sustainability. It is basically conservation agriculture, which increases yields and reduces the impact on the environment (Fitzpatrick, 2015: 5, 6; Allen and Kovach, 2000: 223).

Thirdly, emphasizing the stark differences between traditional agriculture and modernised agriculture is the fact that the end product of the former is environmental sustainability through co-existence with other aspects of agriculture. Mali as well as some places in West Africa, have witnessed the unique development of a symbiotic relationship between the smallholder farmers and pastoralists. This relationship is most likely the result of a concerted agreement to survive and sustain the scarce resources of land and water which has become scarcer as a result of growth in population and reduction of annual rainfall (Oakland, 2011a: 7). Therefore, smallholder farming in Mali ‘involves the complex integration of annual crops, trees and animal husbandry in an agroforestry system known as the parklands’.

The fact is that industrial agriculture in Mali threatens the ecological benefits arising from nature (climate balance, pollination, biological control, soil fertility). These benefits are dependent upon by a vast number of Malians – small and family farmers (Altieri and Toledo, 2011: 591). These benefits include: ecological agriculture, natural farming, conservation agriculture, multi-functional agriculture, organic agriculture, sustainable intensification, climate-smart agriculture, no-till farming and low-external-input farming (Fitzpatrick, 2015: 17). Ecological bases method of agriculture production is far more suitable, it requires less energy consumption and thus releases lower amounts of greenhouse gases (GHG) (Balehegn, 2015). Thus, these farms are more climatic resilient and bio-diverse.

Conclusion

This chapter has provided evidence that land grabs are a threat to food sovereignty in Africa. Land grabs in Mali immediately affect land which is the foundation for food sovereignty. In dispossessing the peasant farmers of their land, land grabbing erodes the foundations of food sovereignty.

The group upon which history has mandated to usher in and consolidate a sovereign food system are weakened and disbanded. Indeed, they are de-peasantised. Entire communities of peasant farmers who have cultivated their lands for generations are relocated from their lands and stripped of their identity. Their duty is no longer the noble attempt at food production for the Malian population, rather, they are given a new identity of being the labourers employed to tend to the large-scale farms or plantations established in the grabbed lands. Women peasant farmers who form the majority of the smallholder farmers experience the greatest effect. They lack the ability to feed their families and this contributes to food insecurity.

The grabbing of the land resource is enough to render the [utopian] dream of food sovereignty hollow. The dispossession of land resources is followed by water grabs which is the reallocation of water resources and the transfer of water rights from the peasant farmers and original owners of the land to foreign investors. Most land is needed for productivity. These foreign “investors” seek to consolidate their land holdings acquired as a result of land grabbing. So, they engage in another form of grabbing, that is of water resources. This resource, as argued in the chapter was far easier to grab than land as a result of lax policies and water governance by the Malian government.

Thus, land grabs fuel water scarcity. The products that these foreign “investors” plant such as biofuel crops - jatropha and sugar cane require great volumes of water to grow and thus they are a threat to the water resource of Mali. This has great implications on food sovereignty as the remaining African smallholder farmers, whose lands have not been taken, lack access to water. This means that food sovereignty cannot be achieved due to lack of water. Of further importance for food sovereignty is the quality of food. When water

is grabbed, the remaining water available for the population will be of low quality.

The impact of these two grabs (land and water) is going to be felt everywhere; however, the first to be destroyed is the environment. The environment is hard hit by this practice of land grabbing and the subsequent use of industrialised agricultural techniques to develop these lands. The soil becomes unusable, nutrients in the soil are depleted and renewal and replenishment of these nutrients is often impossible. The methods used by these land grabbing “investors” is not environmentally sustainable rather, it leaves a food system on the verge of destruction.

One of the key questions for this chapter has been, ‘can land grabs be justified?’ The answer is no, because whatever benefits which derive from the land grabs are temporary and they largely accrue to the transnational corporations. This is because those arguments have no substance; they ignore the reality of the situation.

The reality is that presently, there is a three-pronged approach, examined in this chapter, which erodes the foundation for sovereignty. It is noticeable that this approach specifically targets the pillars necessary for food sovereignty leading to the belief that land grabs are not just the by-products of food and energy crises’. Rather, land grabs are engineered practices geared at attacking the possibility of food sovereignty and deliberately making the aim impossible. Land grabs or large scale land acquisitions, as they are called, are not developmental strategies to build up the economy of Mali, rather they are Mali’s doom. The evidence provided and the reality of the situation proves this.

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Colonial Land Dispossession and Restorative Justice after Genocide: An Appraisal of the Practicality of the Nama and Herero Reparation Claims

Tapiva V. Warikandwa & Artwell Nhemachena

Introduction

The “acquisitions” of vast tracts of land by foreign “investors” in Africa, for commercial purposes, continues to raise much debate on the continent (Odendaal, 2011). It is therefore not surprising that the violent assumption of control of productive commercial land by colonialists has resulted in some of the most atrocious, yet unpunished, crimes against humanity ever recorded in the history of Africa (Burden 2017). No restorative justice has taken place. It is not questionable that land is a viable economic tool which guarantees power and success for those who supposedly “own” and control it (Mendelson, 2003). Colonialists have employed unorthodox means of assuming ownership and control over land at the expense of innocent African natives and their rights to self-determination (Odendaal, 2011). Nowhere is this argument plausible than it is to the regrettable German orchestrated genocide of the Hereros and Namas which took place between 1904 and 1907. The Germans, who during the time of Hitler regarded themselves as a race from the sun, sought to racially exterminate the Namas and Hereros in order to take over their commercially viable land (Olusoga and Erichsen, 2010; Kundrus, 2011; Kundrus, 2005). In a brutal manner, German General Lothar von Trotha overcame the resistance of the Herero and Nama people led by Samuel Maharero and Captain Hendrik Witbooi and drove their victims into the barren desert of Omaheke, where the majority of them died from dehydration (Burden, 2017). Using a brutal Nazi policy, the German forces violently killed the Hereros and Namas in a manner suggestive that the indigenes were

unfit to hold title to the productive land they were living on. Disregarding the property rights of the indigenes, the Germans' brutal conduct of driving some of the Hereros and Namas into the desert where they were later to die of dehydration was suggestive of them being inferior to the Germans and not fit to use and enjoy their productive land which by right belonged to the indigenes.

After the dastardly Nama and Herero genocide which gave them unlawful access to vast tracts of land, the German colonial administration hastened to expand their land interests in Namibia through supposed "negotiated land 'purchases' and protection treaties with local leaders" (Odendaal, 2011). The legitimacy of the negotiated purchases by the same German administration which brutally killed innocent Namas and Hereros is subject to question. If they initially used force to assume control over land, what then would make the same parties settle for a negotiated settlement to expand their land interests? It is evident that the German colonial administration employed any "illegitimate" tactics necessary to obtain land from Namibian indigenes to give the German government and German companies the "rights" to use land (*Ibid*). In this case, it could be argued that the German colonial administration sought to legitimise their illegitimate assumption of control over the land which they brutally seized from the Namibians. It is clear that without seeking to legitimise the violent seizure or brazen theft of the indigenes' land, the future land rights of successors in title would be held to question, as is the case today (Warikandwa & Asheela, 2017).

It is evident that the crime committed by the Germans could not be concealed forever (Liebenberg, 2004). As such, legal measures would have to be taken to legitimise the illegitimate conduct of the German colonial administration. It is therefore not surprising that as part of the negotiated settlements for transition of power from the colonial regimes to the post-colonial African governments, the ill-gotten land rights were supposed to be recognised by the Africans. Title deeds obtained in the colonial era are still enforceable to date. Further, the Germans and indeed other colonial powers have used [phantom] developmental aid as an excuse not to compensate the indigenes for the crimes against humanity and the land theft which

the colonialist perpetrated on the indigenes. For example, German has argued that it has given Namibia developmental aid of an estimated 800 million Euros since independence. The problem with this argument posited by German is that what constitutes development in development aid is sadly defined not by the indigenous Africans but by the so-called donors and their ideological machinery. However, from a Law of Delict point of view, 800 million Euros is a far cry from the losses incurred by the Namas and Hereros from 1904 to date. The Germans still hold title to the ill-gotten land and continue to reap obscene financial profits from the use of such land. On the contrary, the larger majority of the Namas and Hereros continue to wallow in abject poverty.

This chapter will assess the legal viability of the reparation claims made by the Namas and Hereros in the aftermath of the grand dispossession from their land and extermination of the larger majority of their people by the German colonial forces led by General Lothar von Trotha. Historical evidence points to the extermination of 80% of the Herero in Okahandja, the seizure of ancestral homeland of Okahandja, seizure of land used by the Ova Herero for grazing amongst other issues. The Nama and Herero legal action has as one of its central claims for damages the fact that from 1885 to 1907, an estimated quarter of Herero and Nama lands were taken without compensation by the German colonial administration. Up to today, German descendants still farm some of the land and they still possess the skulls of those that they murdered among the indigenous Namibians. As such, this chapter will explore the historical background to the Nama and Herero Genocide. It will also discuss legal regimes adopted in South-West Africa and the Apartheid system which suppressed the land rights of Namibian indigenes. An evaluation of the legal justification of the reparation claims will also be undertaken, with modest recommendations being offered to address the colonially induced injustices on the Namas and Hereros. The analysis of the Namas and Hereros claim could also offer guidelines on how other African countries should handle colonial injustices perpetrated by colonial regimes.

Historical Background to the Nama/Herero Genocide

Land ownership remains a deeply contested issue in Namibia, as is the case elsewhere in Africa. In 1884, as part of the Western countries' colonial expansionist policies and scramble for Africa, Namibia became a Protectorate of German (Odendaal, 2011). At the centre of the expansionist agenda was German's need to access vast tracts of prime commercial land for farming. In the same year of 1884, the German State declared South West-Africa a German colonial territory in order to assert their control on native land (Melber, 2000; Olusoga & Erichsen, 2010; Gann & Duignan, 1977). More land was forcibly seized from the African indigenes, with unjust laws and policies being passed so as to undermine and subjugate the Africans. It is important to observe that, during the early stages of the German colonisation of South-West Africa, the Herero people were socially and economically superior to the Germans (Melber, 2000). This socio-economic superiority had kept the Germans from implementing their colonisation agenda.

However, a mysterious disease called Rinderpest ripped through South-West Africa leading to a devastating loss of 90% of the Herero's cattle herds. Rinderpest (also known as the steppe murrain or cattle plague) was a highly contagious viral disease of cattle (Mohamed, 2008). Death rates were extremely high, reaching nearly 100% in immunologically inexperienced populations such as South-West Africa. The virus was mainly transmitted by, 1) drinking contaminated water, 2) cattle being in direct contact with infected animals, and 3) through air. What is interesting to note is that prior to the 1890s, Rinderpest was not known to Southern Africa. Lugard (1893) pointed out that the disease was introduced along the East Coast of Africa in 1889. If the disease was unknown to Southern Africa in the 1890s, then there is a legitimate basis to contend that Rinderpest's introduction in South-West Africa might have been a "bacteriological warfare" tactic by the Germans. Whilst the 1925 Geneva Protocol prohibits the use of biological warfare, Western countries have employed such tactics during atrocities such as the Hiroshima and Nagasaki bombing, Iraqi war, Rhodesia Bush war (Second Chimurenga), amongst others. It is not in doubt that secret

biological weapons have been used in the world (The Guardian, 2010; Nhemachena, 2016; Gould *et al*, 2002). The net outcome of the devastating Rinderpest was the significant weakening of the Herero. The Herero were impoverished by the obliteration of their source of wealth and undernourished hence physically weakened by the extermination of cattle, their main source of protein (Schaller, 2013; Schaller, 2011; Olusoga & Erichsen, 2010). The weakened Hereros were no match to the rampant and increasingly brutal Germans such that when a group of Namas or Hereros sporadically rose up against the Germans, their efforts were of little or no effect (Mohamed, 2008).

It is therefore not surprising that when the Hereros and Namas finally rose up against the German colonisers, in 1904, their war of rebellion was not successful. Instead, the war of rebellion resulted in the near extermination of both indigenous groups after a brutal attack on them led by General Lothar von Trotha under the instructions of Kaiser Wilhelm II of Germany (Hendrik, 2011). The brutal suppression of the Nama and Herero war of rebellion had severe consequences which inform what is now regarded as the first genocide in the 20th century. In August 1904, General von Trotha ruthlessly defeated the Herero at Waterberg (Tilman, 1993).

The Germans' response to the Nama and Herero war of rebellion was rapid and brutal. In the bloody 1904 Battle of Waterberg, German troops chased around 80 000 Herero men, women and children who fled across the Kalahari Desert to Botswana (*Ibid*). Herero survivors who reached Botswana only numbered 12 000 due to the fact that, in the waterless wasteland of the Omaheke Desert (which is the western extension of the Kalahari Desert), some Hereros were left to die of dehydration and starvation (Olusoga & Erichsen, 2010) as depicted in the picture below.

Picture 1: A dead body of a dehydrated and starvation ravished Herero



Source:

https://encryptedtbn0.gstatic.com/images?q=tbn:ANd9GcT5uRGFU0rcXYckvNwAxxr9gnAXuvRh5Oc1U_VOMYn_-kxDGe1 (accessed 30 June 2017).

In October 1904, General Lotha von Trotha, colonial military commander, issued a command that the Herero be exterminated. The Nama and Herero genocide depicts one of the darkest periods in African colonial history, which saw tens of thousands of Herero and Nama people killed in Namibia by Germans between 1904 and 1908. Members of the Herero tribes revolted against German settlers who were claiming land, cattle and other means of subsistence from locals. Surely, restorative justice must be seen to take place in the contemporary human rights driven era. This is so if one considers the fact that Germans have kept human skulls of the Herero as trophies of their conquest in the Herero-German war. An example of such trophies of war is illustrated in the picture below. Such trophies of war have been kept in German for display in museums and for use by students and academics in research with little thought of what such exercises have on the descendants of the victims of the genocide (Warikandwa *et al*, 2017).

Picture 2: A human skull kept as a trophy of war after the Herero and Nama Genocide



Source:

<https://encryptedtbn0.gstatic.com/images?q=tbn:ANd9GcTdrbTFa0JQh71gwAK3M6b5lGsnk5J7pqKpEUytZHDtpSURNU5Ewg> (accessed 29 June 2017).

An estimated twelve thousand Hereros who survived the brutal suppression and the dehydration and starvation in the Omaheke desert were forced to surrender and were placed in concentration camps (Casper, 2005). In the concentration camps, medical experiments were conducted using the Hereros as samples and daily executions took place (Schaller, 2011; Gewald, 1999). As a result of this ruthless attack of the Hereros, 80% of their population was exterminated during the 1904 war of rebellion against oppressive German rule. General Von Trotha is famously quoted as saying, “Within the German borders every Herero, whether armed or unarmed, with or without cattle, will be shot. I shall not accept any more women or children. I shall drive them back to their people - otherwise I shall order shots to be fired at them” (Gewald, 1999; Gann & Duignan, 1977). General Von Trotha even poisoned

watering holes in a bid to exterminate all the Hereros alive. In a report published in London in 1918, and as quoted by Schaller, January Cloete of Omaruru stated under oath that, when they defeated the Herero, German soldiers killed unarmed women and children (Schaller, 2013).

After the ruthless extermination of 80% of the Hereros, the Namas rebelled against the German colonisers in 1905 (Schaller, 2013; Casper, 2005; Olusoga & Erichsen, 2010). The rebellion started what is now known as the Nama-German war. Using guerrilla tactics, the Namas bravely fought the Germans for a period of over two years. During this war, any Nama or Herero person whom the Germans came across, whether a child or woman, was captured as a prisoner of war and sent to a concentration camp (Erichsen & Silverster, 1998). The prisoners of war were then used as slave labour to build docks, buildings and railway lines in South-West Africa. A significant number of buildings in South-West Africa are said to have been built by the slave labour of Nama or Herero prisoners (*Ibid*). Due to the harsh conditions prevailing in the concentration camps, an estimated half of the twelve thousand prisoners captured and held in them died there (*Ibid*).

It is therefore not surprising that the brutal colonial conquest orchestrated by the Germans led to their occupation of land which by right should have been occupied by indigenes such as the Nama and Herero. Odendaal points out that, “By 1903, freehold farmland accounted for 6% of Namibia’s total land service area while 30% was formally recognised as communal land” (Odendaal, 2011: 1). The Nama and Herero genocide was thus the Germans’ *modus operandi* to assume illegitimate control over the indigenes’ land. This assertion is justified by the fact that after the 1904-1907 war between the Germans and the Namas and Hereros, vast tracts of land had been confiscated from the indigenes by proclamation (Odendaal, 2011: 2). Mendelson pointed out that by 1911, an estimated 21% of the total land service area had been allocated as freehold farmland while the recognised communal land area decreased from 30% to a meagre 9 % (Mendelson, 2003). However, whilst Odendaal points to the land issue being a central issue to the Germans’ brutal attempts to exterminate the Nama and Herero people, Erichsen a European

historian mischievously underplayed the significance of the land issue to the genocide. Erichsen argued that:

The areas of German South-West Africa (now Namibia) were formally colonised by Germany between the years 1884 and 1890. The semiarid territory was more than twice as large as Germany, yet it had only a fraction of the population – approximately 250,000 people. *In contrast to Germany's other African possessions, it offered little promise for large-scale mineral or agricultural extractions.* Instead, South-West Africa became Germany's only real settler colony (Erichsen, 2015).

Whilst Namibia is largely covered by vast tracts of a desert area, Erichsen's remarks are simply dishonest and are representative of the opinions of the so-called "white monopoly capitalists". An analysis of Namibia's current economic patterns reflects that mining is the country's biggest contributor to its economy, accounting for 25% of the national income (Warikandwa & Asheela, 2017; Jo-Maré, 2012). Agriculture on the other hand contributes 5% of the national Gross Domestic Product (GDP) with 25% to 40% of Namibians depending on subsistence agriculture and herding. Primary agriculture products include livestock and meat products, crop farming and forestry. Although Namibian agriculture, excluding fishing, contributed between 5% and 6% of Namibia's GDP from 2004-2009, a large percentage of the Namibian population depends on agricultural activities for livelihood, mostly in the subsistence sector. Animal products, live animals, and crop exports constitute roughly 10.7% of total Namibian exports. The Namibian Government encourages local sourcing of agriculture products. Retailers of fruits, vegetables, and other crop products are required to purchase 27.5% of their stock from local farmers. In the largely white-dominated commercial sector, agriculture consists primarily of livestock ranching. There are about 4,000 commercial farms in Namibia, 3,000 of which are owned by whites (Weidlich, 2010). Therefore, Erichsen's argument that Namibia, "offered little promise for large-scale mineral or agricultural extractions" at the time of the German conquest, is grossly inaccurate. Strangely, Erichsen's views continue to be churned out

and accepted in a contemporary Namibia in which the mining sector contributes significantly to the country's GDP.

It is thus clear that the 1904-1907 war between the Germans and the Nama and Herero forces was primarily fought due to an illegitimate interest to control native land by the former. As was the norm during the colonisation and scramble for Africa era, in the 19th century, European countries sought to expand their territories in Africa for selfish economic reasons. In order to expand their empire, they employed brutal and repressive force and systems of governance. Such oppressive systems of governance gradually destroyed indigenes' cultures and suppressed their property rights. Faced with attempts by the Germans to exterminate them, rob them of their land and deprive them of their culture, the Hereros and Namas rebelled to maintain their sovereignty. The rebellion was started by the leader of the Herero, Samuel Maharero, who rightfully felt aggrieved by the Germans' restriction of their rights to freedom and liberty to exercise their cultural practices (Tilman 1993). On the 11th of January 1904, Samuel Maharero ordered his people to resist the German illegal invasion into their sovereign territory (*Ibid*). The Herero resistance started in Okahandja, and subsequently spread to Omarasa as well as Gobabis. Sadly for the Herero, their resistance was crushed in August 1904 (*Ibid*). After the failed resistance, the remains of the victims of the brutal war were exported to Germany where they became key features in museums as depicted in Picture 3 below.

Picture 3: The head of a victim of the brutal Herero and Nama Genocide on display in Germany



Source:

https://encrypted-tbn0.gstatic.com/images?q=tbn:ANd9GcTsRfKbj__g-7cVsxd04pEbwOqMC2JjKojtRgDIwrHdvw5ra9x (accessed 30 June 2017).

The history of German colonial land dispossession in South-West Africa (now Namibia) thus came at a significant cost for the Namas and Hereros, and indeed other natives of the country. Land was ruthlessly seized from the Namas and Hereros to increase the Germans' colonial territory for purposes of establishing settlements and expanding their farming activities. Over time, the Germans continued to rob more of the indigenes' land. Deprived of their livelihood, indigenes were forced to seek employment on the farmlands of white colonial settlers. The German colonial expansion and dispossession were expanded even further into other parts of South-West Africa. They fought, seized and occupied land while dispossessing Namas and Hereros and other African communities in

the process. The conquest and land seizures were achieved through warfare complemented by dubious “treaties”, which colonists claimed were signed by chiefs or leaders of communities. In fact, the Germans sometimes forged the signatures of African chiefs who declined to sign the German treaties. The Namas and Hereros fought to defend and regain their lost land, but the superior weaponry and collaboration by other local communities enabled the colonists to prevail. The damage done to the Namas and Hereros was thus devastating. However, for German trophy hunters, the genocide provided a business opportunity as they collected skulls of their victims for display in museums in Germany. The picture below depicts how heinous the genocide was.

Picture 4: A huge collection of human skulls from victims of the Nama/Herero genocide



Source:

https://encryptedtbn0.gstatic.com/images?q=tbn:ANd9GcTxLWpcp fzwor3e21yRkJxfj9x8YEFNDIpoB-wk_uOoNrmlKHh_sw (accessed 30 June 2017).

After the dastardly deeds of the Germans, their colonial rule came to an end in 1915. The end of the German colonial rule coincided with the explosion of the mineral revolution with the discovery of diamonds and gold in South Africa which gave more impetus to the colonial government to consolidate and entrench its rule. Colonial landowners and industrialists set in motion a process that would consolidate their wealth, while excluding black people through legislative means. As such, when the German colonial rule ended, South-West Africa became a Protectorate of Great Britain. This was in accordance with the British King's mandate held by South Africa in terms of the 1919 Treaty of Versailles. In terms of the 1919 Treaty of Versailles and the South-West Africa Act 49 of 1919, any land previously held by the German colonial administration automatically became State (or Crown) land of colonial South-West Africa. The Governor-General of the Union of South Africa was vested with all the powers to legislate on all matters, including land allocation (Adams *et al*, 1990: 94). The Union of South Africa gave generous loans to white farmers to build dams, drill bore-holes, and buy livestock. Further, expert advice was given to the white farmers to realise maximum yields with regular access to the already subsidised South African marketing system being guaranteed by the same administration. None of these benefits were afforded to native farmers (United Nations Institute for Namibia, 1998: 38). The then Prime Minister of South Africa, HF Verwoerd appointed the Odendaal Commission to ensure that the apartheid policies which were applicable to South Africa would also be applied to South-West Africa. As such the suffering of the natives under the Germans continued under the South African administration. The next section of this chapter thus looks at some of the legal instruments that were employed under the South African colonial administration in legitimising systematic land dispossession and segregating that had been started by the Germans in South-West Africa.

The formation of the South African Union, led to the accomplishment of land dispossession a process which culminated in the white minority state consolidating its grip on Africans' land through passing more laws to dislodge their victims from the remaining land they held. Du Plessis observed that, "By the time of

the advent of the new South Africa, about 17 000 statutory measures had been issued to segregate and control land division, with fourteen (14) different land control systems in South Africa” (Du Plessis, 2011:46). Some of the land control systems applicable in South Africa were also applicable in South-West Africa. This shows the significance of land dispossession in producing a racially and geographically alienated African society.

Pieces of Legislation Used to Realise Land Dispossession in South-West Africa under the South African Colonial Administration

Legal instruments (legislation, resolutions, proclamations and ordinances) played a key role in legitimising the systematic land dispossession and segregating in South-West Africa under South Africa. The South-West African natives were removed from their land and segregated and banned from owning land in urban areas. The white colonialist political hold over the new territories was established and structures of governance were set in place; laws or general rules regulating “native” land ownership were established. The colonial authorities also established “tribal” land or what came to be designated native reserves and passed land ownership/communal land and governance legislation. Some of the legal instruments related to land dispossession and spatial segregation under the South African colonial administration are discussed below. Whilst some of the laws were never applied in South-West Africa, the motive of passing these laws was relevant to land ownership in the colonised country.

The Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 recognised Hereroland, Damaraland, Owamboland, Okavangoland, Eastern Caprivi and Kaokoland as native nations (Namlex, 2004). The Act supposedly sought to assist the aforementioned native nations to develop in an orderly way towards realising self-governance and independence. This approach purported to signify the dubious “sincerity” of the colonists to allow for natives’ self-governance as if before the advent of the colonial settlers the natives did not have functional governance

structures of their own. The colonists' hypocrisy was exposed when they passed the Representative Authorities Proclamation 8 of 1980. The Proclamation established a "second tier" government of eleven native groups, each with an executive and legislative body empowered to issue ordinances in its area of jurisdiction (Odendaal, 2011: 2). The Proclamation made native Representative Authorities trustees of homeland land but the central government in South Africa still owned the land. As such, if a Representative Authority sought to lease land or sell the same, a certificate confirming that the land in question was not required for public or official purposes had to be issued by the cabinet of the South African colonial government. This principle limited the independence of the Representative Authorities.

The real intent of the colonial government in so far as land ownership was concerned could be ascertained from other pieces of legislation and ordinances such as Resolution 159 of 1855. Resolution 159 was adopted on the 18th of June 1855 by the Transvaal Government. The Resolution prohibited any person who was not an Afrikaans citizen of a Boer Republic from owning land. The Resolution specifically proscribed Africans from having the rights of a citizen of a Boer Republic. The Occupation Act for Government Land Situated in the Zoutpansberg and a Small Area in the North-Eastern Corner of the Waterberg District 8 of 1886 allowed the South African government to acquire land for free in the District of Zoutpansberg. The idea here is that the colonists did not have to pay anything for the land they illegitimately obtained from the African natives. The Parliamentary Voters Registration Act of 1887 was passed by the Cape parliament due to pressure applied by the Afrikaner Bond who felt that the English Parliamentarians in the South African colonial government were benefiting from an increasing number of African voters. The Act set requirements for voter qualification using the criteria of land ownership. In principle, voters who owned land under the system of "tribal" or communal ownership were excluded from voting. Mugubane noted that, "The native is to be treated as a child and denied the franchise" (Magubane, 1996: 108).

The Squatters Act 11 of 1887 was passed with a view to regulating "squatting" by natives on "white owned" farms. The Act provided

that not more than five families of blacks were permitted to live on farms. If these five families of blacks were to be permitted to live on “white farms” it would be on condition that such natives would work for the colonists for a period not exceeding three months. The black owners of the land suddenly could no longer exercise entitlements over the land that was rightfully theirs. Dubious land laws ceded land rights to illegitimate white owners. The Volksraad Resolution 359 of 1891 was then adopted as a means to prohibit “squatting” in State lands. Just how natives’ right to exercise entitlement of their land as well as use and enjoyment of the same amounted to “squatting” boggles the mind. It is as surprising as a thief calling the legitimate owner of a thing an unsuitable holder in title.

The Franchise and Ballot Act 9 of 1892 was passed by the Cape government to further reduce the influence of the vote of Africans. This was after more complaints were raised by the Afrikaner Bond which still felt that The Parliamentary Voters Registration passed in 1887 did not go far enough in reducing the power of the African vote. For instance, in the 1890 election which brought Rhodes to power as Prime Minister, the African vote contributed one sixth of Members of Parliament elected. Thus, in response to pressure by the Afrikaner Bond, the Franchise and Ballot Bill was drafted, debated and enacted into law. The Act further raised property qualification from £25 to £75, and added a literacy test where the voter had to be able to write their name, address and occupation. The Africans were greatly disenfranchised by the Act.

The Squatters Law Act 21 of 1895 was passed in the Orange Free State. It prohibited farmers from employing more than 5 African householders on one farm without government permission. The law also prohibited Blacks from living outside reserves. The Native Reserve Location Act 40 of 1902 authorized the Cape government to establish residential areas for Africans outside towns. Only those who were registered voters or had permission to stay outside the township were exempted. The police were empowered to effect the removal of Africans staying in towns and even use force to realise this objective. The Crown Land Disposal Ordinance 57 of 1903 was passed in the Transvaal, replacing the Occupation Act of 1886. Crown land was defined as all unalienated land and all land that was

property of the government regardless of how that land was acquired. As such, whether the colonial government acquired the land in an irregular manner was not material. What mattered most was that supposed “superior” beings had assumed control over the land which rightfully belonged to apparent “inferior” beings.

The Land Settlement Act 12 of 1912 was passed by the Parliament of South Africa. The Act set out provisions for the sale of state land to white people only. After the passing of the Act, 210 farms covering a total area of 168,636 hectares were given to white farmers over a period of four years. The Natives Land Act 27 of 1913 contained the most disastrous provisions for Africans. It prohibited Africans from buying or hiring land in 93% of South Africa. In essence, Africans, despite being more in number, were confined to ownership of 7% of South Africa’s land. Section 1(a) of the Act provided that: “a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude there over.” However, Africans were permitted to buy and sell land in reserves or scheduled areas while Europeans were prohibited from owning land in these places.

The Natives (Urban Areas) Act 21 of 1923 gave power to urban local authorities to set aside land for African occupation in separate areas which were called locations. Land was not owned by Africans, but simply occupied, and people living in these areas largely worked in urban areas. White land owners within 5 kilometres of the proclaimed urban areas were prohibited from allowing Africans other than their employees to reside on their property. Employers were also required to house those of their employees who did not live in locations. All these were attempts to prevent the emergence of settlements on the outskirts of the urban areas. By design, the Act was an instrument of controlling the influx of Africans into urban areas. Those Africans who were described as “idle”, “habitually unemployed” and those who “did not possess the means of honest livelihood” were deported. It is notable here that whereas on one hand settlers insisted on the dispossessed Africans having “honest” means of livelihood, on the other hand they conveniently forgot that they [settlers], in so far as they dispossessed Africans, did not possess

honest means of livelihood in Africa. The Slums Clearance Act of 1934 enabled municipalities to forcibly remove people who were settled in areas that were considered to be slums.

The Native Trust and Land Act 18 of 1936 marginally extended the total percentage of land in the South African Union allocated by the Natives Land Act of 1913 to Africans as reserves from 7% to 13.6%. This Act was later renamed as the Development Trust and Land Act. Under the Act “squatting” or occupation of certain land by Africans was made illegal, unless they owned such land or were employees or dependants of the employee of the land owner. The Act also established the South African Native Trust (SANT) which bought all reserve land that was not yet owned by the government and identified the so-called “Black spots” to be taken over. Under this Act, African people were rounded up and sent to reserves. The Natives Laws Amendment Act 46 of 1937 prohibited the buying of land by Africans from Whites in urban areas except by permission from the government. Under the Act, authorities in urban areas were to keep a record of all Africans living in the designated area. If the Minister of Native Affairs felt that the number of Africans had increased above the needs of the labour market, he was empowered to expel the “excess number”.

The Group Areas Act 41 of 1950 permitted the South African government to establish separate residential areas based on race. In terms of the Act, Black or White South Africans were prohibited from buying property or living in areas that had been proclaimed as areas for one racial group. This Act saw the destruction and forced removal of Black communities such as District Six in Cape Town, Sophiatown in Johannesburg and Cator Manor in Natal when their areas were proclaimed as White. The Prevention of Illegal Squatting Act 52 of 1951 provided that private landowners and local government authorities were compelled to demolish and remove all structures or buildings that were built without permission of the land owner. The same was applicable for local government authorities concerning buildings or structures erected in violation of building regulations or planning provisions.

The Natives Resettlement Act 19 of 1954 gave the South African government power to remove African land owners and tenants with

legal rights in urban freehold areas. The Act increased government control over African areas of settlement regardless of whether those areas were designated or not. In essence, the Act gave the government power to prevent Africans from living in or close to cities by relocating them to far flung areas such as townships. Section 2 of the Act provided for the creation of a Natives Resettlement Board to provide for the removal of African people “from any area in the magisterial district of Johannesburg or any adjoining magisterial district and their resettlement elsewhere”. As a consequence, after passing into law of the Act, there was a forced relocation of 100,000 Africans from Sophiatown and western Johannesburg to Meadowlands and other areas.

The raft of colonial laws passed to further disenfranchise the Africans who lost their land to the colonists clearly indicates intent on the aggressors to inflict generational harm and economic loss on their defenceless victims. The colonialist offenders who committed atrocious crimes which prejudiced native Africans of their prized asset, land, continue to benefit from their dastardly deeds in the contemporary era. This brazen crime cannot be left unchallenged. The reparation claims of the Namas and Hereros are thus plausible. In order to provide impetus to the reparation claims, justification of their claims will be sought from the law of delict. The next section provides an analysis of the practicality of the Namas and Hereros’ claims in terms of the law of delict.

The Practicality of the Nama/Herero Claims: A Law of Delict Perspective

The world’s attention has now been drawn to the immoral deeds of the Germans, through the Namas and Hereros’ claims for reparation. Media attention, as depicted in the picture below, has been drawn to one of the largely concealed crimes of the 20th Century.

Picture 4: Journalists take pictures of preserved skulls of victims of the Nama and Herero genocide



Source: http://www.huffingtonpost.co.za/2017/03/20/namibia-will-seek-30-billion-from-germany-for-genocide-reparati_a_21903132/ (accessed 4 July 2017).

The skulls that had been kept in museums as trophies of a brutal genocide are now evidence of a heinous crime committed by offenders who are yet to account for their unlawful actions. It is in this regard that the legal merit of the reparation claims of the Namas and Hereros is tested. The reparation claims of the Namas and Hereros are sure to find justification in the law of delict. The law of delict (or the law torts as it is called in the United Kingdom) is concerned with the circumstances in which a person can claim compensation from another for harm that has been suffered (Loubser *et al*, 2012; Neethling *et al*, 2015). This point was emphasised by Brazier who noted that:

The law of torts is concerned with those situations where the conduct of one party causes or threatens harm to the interests of other parties ... It is accordingly the aim of the law of torts to define the obligations imposed on one member of society to his or her fellows, and to adjust, once it is decided that some adjustment is to be made, those losses which must inevitably result from the ever-increasing

activities of those who live in a common society. *This adjustment is made by providing compensation for the harm suffered by those whose interests have been invaded owing to the conduct of others* (Brazier, 1993:3).

The law of delict thus has a normative purpose of setting standards of behaviour for human conduct beyond the compensatory regime it promotes. It prescribes a set of ethical rules and principles for social interaction. Boberg in outlining the hidden role of the law of delict to society stated that, “Law ... is a form of social engineering. This is particularly true of the law of delict, which is close to the core problem of balancing individual freedom against collective security ...” (Boberg, 1984: 26). *Implicit in the law of delict is a sense of morality and fairness* (Loubser *et al*, 2012: 5). Lord Atkin, in the famous case of *Donohue v Stevenson* (1932) AC 562 at 580, stated that, “The liability for (delict) ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay ... *The rule that you are to love your neighbour becomes in law: You must not injure your neighbour ...*”. Van der Merwe and Olivier have provided a definition of the law of delict as follows:

A delict is understood to be a wrongful and culpable act that causes another harm or infringes another’s personality interest. Within the realm of the law of delict belong all rules that determine the private-law liability of a person who has caused harm or a personality infringement to another in a wrongful and culpable way (Van der Merwe & Olivier, 1989: 1).

Boberg (1984: 16) pointed out that for delictual liability to be established, it must be proven that a legal subject infringed another’s interests. Neethling *et al* (2010: 8) argued that fault must be a key requirement for delictual liability to exist. Van der Walt and Midgely (2005: paragraph 2) provided a narrow definition of a delict to be a “wrongful and blameworthy conduct which causes harm to a person”. The law of delict thus protects personal security and personal property as well as the following listed issues:

- Mental health in the form of pain and suffering in relation to physical injury;
- Mental health (psychiatric interests) generally;
- Business interests, such as goodwill and customer bases;
- Interests that are purely economic; and
- Personality interests such as privacy and identity (Loubser *et al*, 2012: 9).

It is evident that from the general definitions of the law of delict provided in this section, the Germans inflicted harm on the Namas and Hereros in a manner that subverted the social order and cohesion that was prevailing in African societies at the time. The genocide satisfies the elements of a delict which are that there must have been, 1) harm; 2) conduct; 3) causation; 4) fault; and 5) wrongfulness. For a delict to arise there must have been actual or potential harm (Loubser *et al*, 2012: 45). In the case of the Namas and Hereros, they lost their land, livestock, lives, future economic income, and suffered from the impairment of their dignity (The concept of dignity is outlined in the case of *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 47) amongst other violations. They also were subjected to pain and suffering, the infringement of their personality interests, as well as the infringement of their privacy. Harm can thus be categorised into patrimonial and non-patrimonial harm. Patrimonial harm relates to physical injury to a person, damage to property and pure economic loss (Loubser *et al*, 2012: 62). Non-patrimonial loss refers to pain and suffering (pain, loss of amenities, physical injury, and psychiatric injury) and infringement of personality rights (bodily integrity, dignity, privacy, identity and reputation) (*Ibid*). The Namas and Hereros suffered both patrimonial and non-patrimonial harm. The Germans have acknowledged the harm suffered by the Namas and Hereros and offered a perfunctory apology (Huggler, 2016).

Harm is not the only delictual element which must be satisfied for a delict to be realised. There must be a conduct (whether by commission or omission) which must cause the harm suffered by another person (Loubser, 2012: 63). Such conduct must be a human conduct (irrespective of whether it was a delegation, use of an animal, through vicarious liability, amongst others) (*Ibid*). In the Nama and

Herero Genocide, the conduct was that of German soldiers acting on instructions from the German colonial administration. As such, the conduct was a human conduct. There must also be a causal link between the wrongful conduct and the harm suffered by victim (Loubser *et al*, 2012: 64; *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34-35; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700; *Minister of Safety and Security v Carmichele* 2004 (3) 305 (SCA)). The Germans' wrongful conduct materially contributed to the harm (genocide) suffered by the Namas and Hereros.

Fault must also be proven to establish delictual liability. Fault has two elements which are: 1) the person causing the harm must have been accountable at the time of causing the harm (capacity to be at fault); and 2) the person must have been culpable (the person acted intentionally or negligently) (Loubser *et al*, 2012: 103). The Germans intentionally and negligently killed the Namas and Hereros in a bid to expand their colonial empire under the instruction of Kaiser Wilhelm II. The grand theft that led to genocide was replete with fault in its absolute sense. The last element to be satisfied is that of wrongfulness. Brand AJ in the case of *Le Roux v Dey* 2011 (3) SA 274 (CC) at paragraph 122 described wrongfulness as follows:

... a) the criteria of wrongfulness ultimately depends on a judicial determination of whether - assuming all the other elements of delictual liability to be present - it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.

The general standards for determining wrongfulness are general reasonableness, the legal convictions prevailing in the community and *boni mores* (Loubser, 2012: 144). As such, when enquiring into the wrongfulness of the Germans' conduct in view of the Nama and Herero Genocide, one can focus on the infringement of a right (right to life, right to land, property rights, right to dignity, to name but a few which were violated in the process leading up to the genocide and the genocide itself) or on the breach of a legal duty. The decision

on whether the conduct was wrongful also involves an assessment of reasonableness and public policy (*Ibid*). The court must also weigh up the interests of the people involved (Germans, Namas and Hereros) and take into account the interests and convictions of the community. From a human rights perspective, it was not reasonable for the Germans to kill the Namas and the Hereros for their land. From a property rights perspective, it was simply unlawful for the Germans to seek to unjustly enrich themselves at the expense of the lives of the Namas and Hereros who were legitimately exercising their property rights and sovereignty. Simply put, the Germans' conduct was immoral and therefore wrongful.

With all delictual elements having been satisfied, it is thus proper to look at the three pillars of delict from which the Namas and Hereros could seek recourse for the Germans' dastardly deeds. The three pillars of delict are the *actio legis Aquiliae*, *actio iniurarium* and action for pain and suffering. For the purposes of the analysis advanced in this chapter, emphasis will not be placed on the historical development of the three pillars of delict but on their scope and application in the present day context. In the present day context, the Namas and Hereros could rely on Aquiliation action for the culpable and wrongful act of the Germans which caused patrimonial damage to them (patrimonial damage refers to the reduction in a person's financial position due to the conduct of another). The Germans killed the Namas and Hereros as a way of taking away their land. Land was the Namas and Hereros' key financial tool as they raised large herds of cattle on the same. The land was the Namas and Hereros' economic source of livelihood. Further, the potential future economic earnings lost as a result of the killing of able bodied Namas and Hereros is immeasurable. As such, as remarked by Watermeyer J in the case of *Perlman v Zoutendyk* 1934 CPD 151 155, "... all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*)". This position was affirmed in the case of *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377, where Booysen J stated unambiguously that:

The legal basis of the plaintiff's claim is the *lex Aquilia*. In essence the Aquilian action lies for patrimonial loss caused wrongfully (or unlawfully) and culpably. Although the contrary view had long been held by many authorities, it seems clear that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely economic, is not a bar to the Aquilian action.

Actio iniurarium also offers another delictual pillar from which to advance the Nama and Herero reparation claims. In the case of *R v Umfaan* 1908 TS 62 66, Innes CJ stated that an *iniuria*:

... is a wrongful act designedly done in contempt of another, which infringes his dignity, his person and his reputation. If we look at the essentials of an *iniuria* we find ... that they are three. The act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights, those rights *in rem*, related to *personality, which every free man is entitled to enjoy*.

In principle, *iniuria* refers to the wrongful, intentional infringement of or contempt for a person's corpus (physical integrity), *fama* (good name) and *dignitas* (honour) (Neethling *et al* 2015: 15). Whilst the issue of *fama* may not be applicable in the Nama and Herero case, the conduct of the Germans certainly infringed upon the physical integrity and honour of the Namas and Hereros, in which case a delictual action could arise.

The action of pain and suffering could offer a separate avenue in the law of delict through which the Namas and Hereros could successfully claim for damages. All Namas and Hereros suffered pain, experienced suffering and bodily disfigurement in some cases, as a result of physical injuries emanating from the conduct of the Germans. Whilst the action of pain and suffering is independent from the *actio legis Aquiliae*, it protects the physical-mental integrity of a person in its entirety (Neethling *et al*, 2015: 16). Under this action, compensation can be sought for psychological or mental injury in the area of emotional shock, and loss of (or shortened) life expectancy, as well as loss amenities of life and health (*Ibid*). There is therefore

no doubt that the Namas and Hereros' reparation claims have a basis in the law of delict and are thus practical. In a regular legal tribunal/court, the reparation claims should succeed. This way, restorative justice will be realised and the wounds of the surviving Namas and Hereros will be healed. Colonial injustices have gone unpunished. It is high time justice is seen to be done and not heard to be done.

Recommendations

The Namas and Hereros' reparation claims in the aftermath of the brutal genocide at the hands of the Germans is legitimate and therefore with merit. As such, the following should be the focal point made in the ruling on the matter:

1. The Land forcibly taken by the Germans and any such land still being held by German descendants in Namibia must be returned to those who were dispossessed by the colonialists' forced removals or in the absence of surviving victims, their surviving descendants. There is need for the restitution of land rights which were lost through dispossession and as effected through discriminatory colonial legislation and use of brutal force. It is important that the restitution process be as speedy as possible. Many Namas and Hereros dispossessed of their land are in economic dire straits, and need urgent relief. The sooner this is relief is granted, the quicker a foundation will be laid for a secure system of land/property rights for all Namibians. Those dispossessed during the Nama/Herero Genocide and by the apartheid regime must now realise justice without undue further delays.

2. Where restitution of the dispossessed land may be deemed impracticable due to any such "plausible reasons" as may be advanced by the perpetrators of the genocide, if any at all, a just and equitable compensation of the land lost must be done at prevailing land market rates. This option should be recourse of last resort. Emphasis must be placed on the restoration of the Namas and Hereros' land rights. Land is the economic tool of choice for the emancipation of African indigenes.

3. Compensation for loss of loved ones, lost income and pain and suffering must be made by the Germans. The Quantum of the claims should be measured from the time of the genocide to the present day, with interest. The argument that developmental aid given by the Germans must suffice to address the Nama/Herero reparations claims is misguided because the developmental aid in question is just but a fraction of the potential revenue or income lost by the Namibian natives due to the genocide and the deprivation of use and enjoyment of their land. The loss of loved ones due to the inhumane and/or brutal killings of the Nama/Hereros in the wars aimed at ensuring that the Germans forcibly assume control over the natives' land is simply a huge loss whose quantum of claim far exceeds the meagre 800 million Euros given by the Germans as developmental aid thus far. It may be plausible to direct all proceeds of a specific Volkswagen plant in Africa to the Namas and Hereros for the next ten years to try and meet the quantum of damages which can be practically determined by any judicial tribunal/court constituting of a panel of judicial officials of sound minds. The figure of 30 billion United States dollars (R381 billion) sought by the Namibians as reparations for Genocide is a reasonable starting point for a political settlement (Staff Reporter 2017).

Conclusion

The atrocious killing of innocent Namas and Hereros in a bid to dispossess them of their land or economically disenfranchise them is one of the immoral conducts whose perpetrators have yet to face justice. The killings have now been classified as genocide. Sadly, the German government has never officially acknowledged the genocide and steadfastly refused to pay direct compensation to the descendants of the victims. The general argument from the Germans has been that they having been providing Namibia with development aid since the country attained its independence from South Africa. According to the Germans, this approach has been more than “generous” and suffices as settlement for the genocide. The Germans’ insensitive response to the claims for compensation from the Namas and Hereros depict the attitude of the same people under

the Nazi regime, when they considered themselves a race from the sun. In an era driven by the human rights agenda, it is shocking for those that regard themselves as paragons of virtue to regard other human beings as inferior and not deserving of their dignity and related rights.

German acceded to compensating victims of World War Two atrocities yet it shamefully refuses to pay reparations to the Namas and Hereros. Surely the Namas and Hereros must be compensated for the savage genocide, and injustices they suffered in concentration camps where scientific experiments were performed on them. Foreign aid granted to the Namibian government is not a guarantee that the Namas and Hereros, as minority indigenous communities, will directly benefit from the financial aid. After all, the Namas and Hereros do not want mere financial aid but self-actualisation through regulating their own affairs as they did before the brutal genocide. Trying to address the loss of economic self-sustenance or independence by creating a dependency syndrome is an insult to the Namas and Hereros and indeed all Namibians. It is in this regard that the reparation claims are regarded as an important legal mechanism for realising restorative justice. There is a legal basis for the claims in the law of delict to ensure that the Namas and Hereros who were brutally killed and dispossessed of their land are compensated. The reparations could go a long way in addressing the land issue, with the legacy of land dispossession still remaining visible on the Namibian socio-political landscape. Land dispossession and segregation were critical edifices in the building of a racially and spatially divided Namibia. It is time the resilient colonial land regime is challenged. The Nama and Herero reparation claims will be instrumental to building momentum of efforts being made at policy and legal level in Namibia and Africa at large, to address colonially induced land dispossession and segregation.

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Expropriation: A Comparative Study of the Jurisprudence of Ghana, Namibia, South Africa and Zimbabwe

Samuel K. Amoo

In a speech marking the formal opening of the Accra conference on legal education and of the Ghana law school, the late Dr. Kwame Nkrumah emphasised the need for the identification of the legal system with the ethos of the society:

There is a ringing challenge to African lawyers today. African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal custom. African law had to be proved in court by experts, but no law can be foreign to its own land and country, and African lawyers, particularly in the independent African states must quickly find a way to reverse this judicial travesty.

The law must fight its way forward in the general reconstructions of African action and thought and help to remould the generally distorted African picture in all other fields of life. This is not an easy task, for African lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and give the African a legal standard upon which African legal history in its various compartments could be hopefully built up. Law does not operate in a vacuum. Its importance must be related to the overall importance of the people, that is to say, the state (Nkrumah 1962: 105).

Introduction: State Sovereignty and Development

One of the essential elements of statehood is the occupation of a territorial area within which a state's law operates. Over this area, supreme authority is vested in the state. Hence, there arises the concept of territorial sovereignty which signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states. In general terms, the

origin of expropriation can be traced to state sovereignty by virtue of which the state is empowered to exercise the right of expropriation over private property in the public interest. This state sovereignty vests the control of the natural resources in the state.

Under international law, nationalisation of private property by the state or expropriation is allowed, but subject to the condition that nationalisation or expropriation is effected in the public interest and subject to payment of compensation. The UN Resolution on Permanent Sovereignty over Natural Resources, 1962, which was adopted in the case of *Texaco v Libya* 1977 53 ILR 389, provides that:

Nationalisation, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any such case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted.

The Doctrine of Eminent Domain

Under the doctrine of eminent domain, the state is given the power to expropriate private property for infrastructural development or public utility such as the construction of bridges railways, roads etc. Therefore, traditionally, under the doctrine of eminent domain the power of the state to expropriate is limited. The eminent domain concept is incorporated in municipal legislation but there is no uniformity in these pieces of legislation in terms of the purpose of expropriation. There are two models. In the first model the power to expropriate is limited to infrastructural development. In the second model, however, the purpose for expropriation is formulated in an open textured manner, generally in terms of public interest, and in most cases no precise definition is given of what constitutes public interest. What constitutes public interest, however,

is not defined under international law and is therefore, subject to municipal laws of a particular jurisdiction.

Procedural Requirements and the Protection of the Rights of the Individual and the Determination of Compensation

Since expropriation involves the deprivation of the right of the individual, it is important that procedural mechanisms and requirements are put in place to prevent any potential abuse of the power to expropriate. Mere substantive rules are not enough; procedural rules are equally important. The procedure involved in the process of expropriation therefore becomes a legal requirement in the sense that it is aimed at ensuring procedural justice, transparency, recognition of the rule of law and the protection of individual rights.

The details of the procedure may vary from jurisdiction to jurisdiction, and stipulated in the relevant legislation, but the most important criterion is that of compliance with the principles of natural justice and reciprocity. This will imply that the individual whose property is to be expropriated is involved, to a certain degree, in the expropriation process and given a fair hearing not only with regard to the amount of compensation but also with regard to the decision concerning expropriation as such is necessary to reduce the possibility of corruption, the irregular promotion of individual interests and the arbitrary use of state power.

The chapter aims at a comparative study of the laws in selected jurisdictions on eminent domain or public interest, the determination of compensation and the procedural mechanisms employed in the process of the exercise of the power by the State and the protection of the fundamental rights of the individual whose property is earmarked for expropriation.

Definition

Expropriation may be defined as the power of the state to compulsorily but lawfully, and for reasons deemed to be in the public interest, acquire ownership or some of the powers contained in ownership in respect of property to the extent that the owner is deprived of the power to use or alienate his or her property in the

manner that he or she may wish to do. Expropriation constitutes a limitation on the right of ownership. Silberberg (1992: 316 cited in Amoo, 2002) defines expropriation as follows:

Expropriation in the strict sense means that the owner is deprived of his right of ownership in his property which then becomes vested in the state or some other public authority or corporation authorized by the state to acquire ownership of the property. In the wider sense expropriation includes measures less than the deprivation of ownership, for instance temporary acquisition of the thing for a particular purpose...

State Sovereignty and the Doctrine of Eminent Domain

The Doctrine of Eminent Domain under Municipal Laws of Selected Jurisdictions

One of the essential elements of statehood is the occupation of a territorial area within which state law operates. Over this area supreme authority is vested in the state. Hence there arises the concept of territorial sovereignty which signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states (Shearer, 1994: 144).

In general terms, the origin of expropriation can be traced to state sovereignty by virtue of which the state is empowered to exercise the rights of sovereignty over its natural resources (including the power to expropriate). With regard to the exercise of state sovereignty over land, the particular land tenure system of a state is a product of the political and economic ideology of the society. The legal framework may be taken as an expression of that ideology defining the rights and duties in relation to land and the procedure for its acquisition and use. In the context of land expropriation, however, international law prescribes certain norms. In the Namibian context the legal authority to expropriate is provided for in article 16(2) of the Namibian Constitution. The article empowers the state, or any competent body or organization authorized by law, to expropriate property in the public interest subject to the payment of just compensation.

As stated earlier, the power given to the state to expropriate private property in the public interest is derived from state sovereignty which vests the control of the natural resources in the state. Under the doctrine of eminent domain, the state is given the power to expropriate private property for infrastructural development or public utility such as the construction of bridges railways, roads etc.

Seervai (1967: 144) discussing articles 19(1)(f) and 31 of the Indian Constitution which deal with the right of citizens to acquire, hold and dispose of movable and immovable property, points out that the sovereignty of the state involves three elements, namely the power to tax, “police power” and “power of eminent domain”. The author further refers to the definition of “police power” as “the inherent power of a government to exercise reasonable control over person and property within its jurisdiction in the interest of general security, health, safety, morals and welfare, except where legally prohibited (as by constitutional provision)”. The accepted definition for “eminent domain” is “the power of the sovereign to take property for public use without the owner’s consent upon making just compensation”. The distinction between the exercise of the state’s police power and its power of eminent domain is similar to South African expropriation law (1997: 243). This distinction between the state’s police power and its power of eminent domain is also found in the property jurisprudence of Namibia specifically under articles 16 and 100 of the Namibian Constitution. Articles 16(1) and 100 can be compared to the state’s police powers and Article 16(2) to its powers of eminent domain.

Traditionally, under the doctrine of eminent domain the power of the state to expropriate is limited. The eminent domain concept was incorporated in legislation but there was no uniformity in these pieces of legislation in terms of the purpose of expropriation. There were two models. In the first model the power to expropriate was limited to infrastructural development. In the second model, however, the purpose for expropriation was formulated in an open textured manner, generally in terms of public interest, and in most cases no precise definition was given of what constitutes public interest.

Under international law, nationalisation of private property by the state or expropriation is allowed, but subject to the condition that nationalisation or expropriation is effected in the public interest and subject to payment of compensation. What constitutes public interest, however, is not defined under international law and is therefore subject to municipal laws of a particular jurisdiction. The United Nations Resolution on Permanent Sovereignty over Natural Resources, 1962, which was adopted in the case of *Texaco v Libya* (1977 53 ILR 389), provides that:

Nationalisation, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any such case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted.

But, as Dunning (1968: 1286; Kaarst & Rosenn 1975) puts it:

The relationship between the state and the development process has an important bearing on the purpose limitation in the law of eminent domain. In the past, the public purpose doctrine has meant that the state could only take property by eminent domain where that property was needed for “public” activities. Compulsory acquisition was limited to traditional state activities – such as defence, highways, and education. But the modern African government seeking active economic development acts in all spheres. The state either engages directly in production or takes important action to enable private persons to produce and develop. When the state has a dominant and rapidly increased production, any productive purpose becomes a public purpose.

Namibia

As mentioned earlier, the traditional concept of public interest as contemplated within the context of eminent domain, includes infrastructural development and public utility. The provisions of the Namibian Constitution relating to the power of the state to compulsorily acquire private property are provided for under article 16 (Article 16 of the Namibian Constitution provides as follows: “(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The state or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.”). The purpose of limitation in the eminent domain clause is an entrenched provision. Article 100 of the Namibian Constitution vests sovereign ownership of the natural resources of Namibia in the state (Article 100 of the Namibian Constitution states that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the state if they are not otherwise lawfully owned). Article 16, however, acknowledges private ownership but empowers the state to compulsorily acquire private property in the public interest subject to the payment of just compensation. Article 16 further states that an Act of Parliament should be promulgated for the exercise of the power of expropriation. The article does not define “public interest”. In the premise, therefore, the determination and definition of “public interest” lie within the subjective jurisdiction of the state. It is a legal requirement falling within the sphere of political definition.

Since the constitution leaves the definition of public interest undefined and open textured, the attempts at definitions are found in a particular piece of legislation. Currently in Namibia, depending on the relevant portfolio, pieces of legislation have been promulgated

to empower the state or an appropriate authority to expropriate private property for various purposes.

In the context of the constitutional and political history of Namibia, land resettlement and agrarian reform will legitimately come within the definition of public interest. It is in this context that one can see the justification for the promulgation of the Agricultural (Commercial) Land Reform Act 6 of 1995. In this Act, public interest has been defined to include agricultural and resettlement purposes in the context of the government's land reform and poverty alleviation programme. The purpose of the Act is to provide for the acquisition of agricultural land by the state for the purpose of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land.

The Agricultural (Commercial) Land Reform Act 6 of 1995 regulates the purchase and redistribution of privately owned farms. The relevant sections of the Act in respect of acquiring agricultural land and expropriation of such land are section 14, providing for the purchasing of agricultural land by the state on a willing buyer willing seller basis, and section 20, providing for expropriation of such land and requirements thereof. The Act also provides for the appointment, composition, powers and duties of the Land Reform Advisory Commission. The technical commission on commercial farm land was mandated to investigate the entire land tenure situation in Namibia and make recommendations as far as *absentee foreigners* are concerned.

The Act was promulgated as the legislative tool for the implementation of the Government's land reform programme. In the context of legislative restrictions on the right of ownership, the Act imposes dual restrictions. The first type of restriction entails the pre-emptive right, the so-called *willing buyer willing seller* option granted to the Minister, in terms of section 17(3), and the second type of restriction arises from the Minister's power to expropriate agricultural land for the purposes of land reform, resettlement of the landless and poverty alleviation in terms of section 14 but subject to the requirements and procedures provided in sections 14 and 20. These requirements include the payment of compensation and the public interest provision.

The Act gives the Minister two options: the power to acquire land on the basis of willing buyer willing seller option or compulsory acquisition. Section 14 of the Act grants the Minister the general authority to acquire, out of moneys appropriated by Parliament for that purpose, agricultural land for implementation of land reform and resettlement policies. It is therefore clear that expropriation is not the only option; it is the last option (See section 20(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995). Section 14(2) provides as follows:

The Minister shall under this subsection acquire:

(a) any agricultural land offered for sale to the Minister in terms of section 17(4) whether or not the offer is subsequently withdrawn;

(b) any agricultural land which has been acquired by a foreign national, or by a nominee owner on behalf of or in the interest or in the interest of a foreign national, in contravention of section 58 or 59; or

(c) any agricultural land which the minister considers to be appropriate for the purposes contemplated in that subsection classified as under-utilized and in terms of subsection (3);

(d) any agricultural land or portion or portions of such land classified as excessive land in terms of subsection (3); or

(e) any agricultural land acquired by a foreign national, or by a nominee owner on behalf or in the interest of a foreign national, in contravention of section 58 or 59.

These provisions have been amended by virtue of sec. 2(b) of Act 14 of 2003 as follows:

(1) The Minister may under subsection (1) acquire-

(2) (a) any agricultural land offered for sale to the Minister in terms of section 17 (4), whether or not the offer is subsequently withdrawn;

(b) any agricultural land which has been acquired by a foreign national, or by a nominee owner on behalf or in the interest of a foreign national, in contravention of section 58 or 59; or

(c) any agricultural land which the Minister considers to be appropriate for the purposes contemplated in that subsection.

These requirements appear to be in harmony with international standards. In *Texaco v. Libya* (1977) 53 ILR 389 it was held that nationalisation of property by the state or expropriation is allowed, but subject to the condition that nationalisation or expropriation is done in the public interest, subject to payment of just compensation. Similar provisions are to be found in the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources, which states *inter alia* that expropriation, shall be based on grounds for or reasons of public utility, security or the national interest which are recognised as overriding purely individual and private interests.

The State's power to expropriate agricultural land which is exercised by the Minister under the Act to advance the Government's land reform and poverty alleviation programme, was considered by the court in the *Gunther Kessl v Ministry of Lands and Resettlement and Others* 2008(1) NR 167(HC) case, which was described as a "test case" by Muller J. In this case, the applicants applied for an order to review and set aside the decision of the Ministry of Lands and Resettlement to expropriate certain farms belonging to the applicants in the Otjozondjupa Region of the Republic of Namibia. The applicants initially conceded that the Government of the Republic of Namibia has the right to expropriate farms under certain conditions and therefore only two main issues needed to be considered by the court. Firstly, the question whether the *audi alteram partem* principle was relevant in expropriation cases such as those before the court and, secondly, whether the procedure that was followed in all these three cases before the court was in conformity with the law.

As stated earlier, since the Act in principle imposes restrictions on the constitutional right of ownership, the court reiterated the principle that an act or statute that provides for actions that may infringe fundamental rights should be interpreted restrictively in such a manner as to place the least possible burden on subjects or to restrict their rights as little as possible. The rights of the public should be properly balanced against those of subjects by adhering to the requirement of "public interest" in article 16(2) and the provisions of section 14 of the Act.

On the issue of the relevance of the *audi alteram partem* principle in expropriation cases such as those under consideration, the court held that article 16(2) is not a self-contained or “walled-in” provision, excluding the application of the *audi alteram partem* (The decision in *West Air Aviation and Others v Airports Company Limited and Another* 2001 NR 256 (HC) in respect of applicability of the *audi alteram partem* principle was confirmed) principle which was therefore held to be applicable. In the context of the Act, the exercise of the powers of expropriation granted to the Minister was therefore subject to the provisions of article 18 of the Namibian Constitution and the common law grounds for review of administrative discretion (*Immigration Selection Board v Frank* 2001 NR 107 (SC)). In terms of the said article, the Minister may only act within the limits of his statutory discretion and should apply his mind to the requirements of the enabling Act. In order to expropriate land, it must be done within the provisions of the Act and involves a double-barrel process, namely, firstly, in terms of section 14 and then, in terms of section 20. This provision is peremptory and must be complied with *before* the Minister takes a decision. Furthermore, the court held that under the provisions of section 20(6) the Commission is obliged to consider the interests of the persons employed and lawfully residing on the land and the families of such persons residing with them. This factor becomes a variable in the determination of what constitutes public interest (*Aonin Fishing (Pty) v Ministry of Fisheries and Marine Resources* 1998 NR 47).

The Land Reform Advisory Commission established under section 2 of the Act is mandated to make recommendations to the Minister or advise the Minister in relation to any power conferred upon the Minister by the Act. The court held that such consultation between the Minister and the Commission was a prerequisite before embarking upon the section 20 expropriation process, and that such consultation should take place at the section 14 stage when a determination as to whether there was a willing buyer and willing seller must be made and *before* the Minister decides to purchase a particular farm. The requirements of this provision go beyond a mere consultation; they demand genuine consultation.

Under the authority granted by these provisions and other relevant laws, the Minister on behalf of the government to date, has acquired 461 000 hectares of land, including 22 605 hectares which were donated. Total Government expenditure is N\$ 52 451 355, 79 for the purchase of 79 farms and it must be emphasized that all these farms were purchased on a willing buyer, willing seller basis. During the NDP1 the government spent N\$ 45 921 168, 79, and a total number of 22 083 people were resettled. It is, however, now estimated that about 34 000 Namibians have been settled through the government's resettlement programme (As stated in *The Namibian* (30 August 2000)), and the Ministry intends acquiring an additional 360 000 hectares of land in the next five years and approximately 1 080 people will be resettled.

The criteria used by the Ministry for the selection of people to be resettled are embodied in the Government Resettlement Policy. The policy places people to be resettled into three categories. The first group consists of Bushmen, and any landless former disadvantaged Namibian; the second group consists of landless livestock owners; and the third group comprises people with income but who do not own any land. The resettlement programme aims at improving the living standards of the previously disadvantaged Namibians. Therefore, the resettlement schemes are not restricted to the provision of land for only agrarian purposes. The resettlement schemes have a broader social agenda. They include provision of training facilities and housing. People who are resettled hold the land under leasehold titles of 99 years.

The power to expropriate privately owned farms is the other option granted to the Ministry by the Act. Under Section 20 (Section 20 provides as follows: "(1) Where the Minister decides to acquire any property for the purposes of section 14(1) and the Minister, acting on the recommendation of the Commission, and the owner of such property are unable to negotiate the sale of such property by mutual agreement, or the whereabouts of the owner of such property cannot be ascertained after diligent inquiry, the Minister may, subject to the payment of compensation in accordance with provisions of this Act, expropriate such property for such purpose") in terms of which the Minister, acting on the recommendation of the

commission, and the owner of the property are unable to negotiate the sale of the property by mutual agreement, the Ministry may provide for the condition that the exercise of the power to expropriate be subject to the payment of compensation.

Ghana

The Ghanaian Constitution guarantees the right to property and ownership of property. Under article 18(1) every person has the right to own property either alone or in association with others. Article 20(1) provides that no property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied:

(a) The taking of the possession or acquisition is necessary in the interest of defence, public safety, public order, public morality public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and

(b) The necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property

The constitution under subsection 2 mandates that compulsory acquisition of property by the State shall only be made under a law which makes provision for the prompt payment of fair and adequate compensation and a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled. The Constitution furthermore, places an obligation on the State by prescribing that where the compulsory acquisition duly authorized by the State results in displacement of any inhabitants, the State is under obligation to provide a suitable alternative land to the affected inhabitants with due regard for their economic well-being and social and cultural values. The Constitution clearly provides that any property which is compulsorily acquired in the public interest shall be used only in the public interest for which it was acquired. Where the property is not used in the public interest, the affected individual or owner of the property immediately before the

compulsory acquisition shall be given the first option for acquiring the property. Upon such re-acquisition he or she shall refund the whole or part of the compensation paid to him or her or such other amount as is commensurate with the value of the property at the time of the re-acquisition.

South Africa

The South African Constitution contains grounds for expropriation which are also more elaborate and specific, as compared to the Namibian provisions, and include the traditional grounds of eminent domain. Under the South African Constitution section 25(4)(a) states that property may be expropriated for a public purpose or in the interest of the public and section 25(4)(a) explains that the public interest includes the nation's commitment to land reform to bring about equitable access to all South Africa's natural resources. The public purpose requirement can be interpreted in at least three different ways: very narrowly to restrict expropriations to actual public use; slightly wider to include almost any public benefits that exceed actual public use; or very widely to include almost any purpose that is vaguely beneficial to the public interest. The public purpose requirement in section 25(2) has a double function, namely to control the justification and authority for expropriations in the way that constitutional property clauses usually do, and further to ensure that this normal function of the property clause does not impede or frustrate expropriations that form part of land and other similar reforms to which the Constitution commits itself (Van der Walt 2011: 245).

The South African constitutional provision gives the South African government the power to acquire land for land resettlement and reform. Apart from the constitutional provisions pertaining to compensation the Restriction of Land Rights Act 22 of 1994 provides for the restitution of rights to land for persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. For the purpose of claiming restitution this Act also established the Land Claims Court.

Zambia

In Zambia, as in Namibia, the colonial government divided land, into state land trust and reserves. The law applicable to state land was the English land law. All land in the reserves and trust areas was held under customary land law. This division was effected by the Northern Rhodesia Order in Council of 1924. This proclamation was followed by the enactment of the Public Lands Acquisition Ordinance of 1929, which applied only to state land. Under section 53 of the Public Land Acquisition Ordinance of 1929, the Governor was empowered “to acquire any lands required for any public purpose for an estate in fee simple, or for a term of years as he may think proper, paying such consideration or compensation as may be agreed upon or determined under the provisions of the Ordinance” (The definition of “public purpose” included the following: “Any land (1) for the exclusive use of the Government or Federal Government or for general public use; (2) for or in connection with sanitary improvements of any kind including reclamations; (3) for or in connection with the laying out of any new municipality, township in Government station or the extension or improvements of any existing municipality, township or Government station; (4) for obtaining control over land contiguous to, or required for or in connection with any port, airport, railways, roads, or other public works of convenience, constructed or about to be undertaken by the Government or Federal Government”).

After independence, however, the Zambian government felt that the then existing legislation relating to land had certain inadequacies located specifically in the provisions of clause 18 of the Constitution. Clause 18 provided for compensation in the event of expropriation, but compensation had to be paid and certain conditions had to be satisfied. The circumstances, under which compulsory acquisition could be allowed, came generally within the scope of the orthodox definition of the right of eminent domain. These circumstances were substantially identical to those given under section 53 of the Northern Rhodesia Public Lands Acquisition Ordinance of 1929, which after independence became known as the Public Lands Acquisition Act.

In addition to these conditions, it was provided that the Government had to pay adequate compensation immediately after expropriation, and provision had to be made for the guarantee of the remittance of money outside the country free from any deduction, charge or tax made or levied in respect of its remission.

This clause was entrenched and could only be repealed by referendum. In 1969 a referendum was held to amend clause 18 of the independence Constitution. It was argued that since the existing laws of expropriation embodied in clause 18 of the Constitution and the Public Lands Acquisition Act were designed to serve the economic interests of the colonial government and were therefore obsolete as a result of the shift in emphasis of economic planning towards rapid development and state participation, the existing laws of expropriation had to be repealed.

The government made it an objective of the new Public Lands Acquisition Act (Public Lands Acquisition Act cap 296 of The Laws of Zambia) to eliminate a society of powerful landlords on the one hand and tenants and workers on the other hand. The Act denied the right of compensation in respect of undeveloped or unutilized land except for unexhausted improvements. Even for unexhausted improvements, no compensation was payable if the land was unutilized land belonging to an absentee landowner. In addition, it is interesting to note that the power to acquire land was not restricted only to cases where it was needed for public purpose. In fact, "public purpose" was eliminated from the Act. Section 3 of the Act reads as follows, "Subject to the provisions of the Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily acquire any property of any description." This provision was more liberal than the provision of the earlier Act. For "public purpose" the latter Act substitutes "interests of the Republic" (*Ibid*, section 3) which is not defined in the Act and which is determined only at the discretion of the President.

Zimbabwe

In Zimbabwe the land question was one of the issues that had to be settled at the Lancaster House Conference. The Lancaster House

Constitution that brought an end to colonial rule in Rhodesia under part III had an enshrined provision that protected fundamental rights to private property and restricted the right of the state to compulsorily acquire land for agriculture or resettlement. Any compulsorily acquisition had to be accompanied by prompt and adequate compensation (See section 11(c) of the Lancaster House Constitution of Zimbabwe) and it was negotiated and agreed that the British government had to make funds available for that purpose. The circumstances under which the state could compulsorily acquire property in the public interest were clearly defined in the Constitution. Property could not be compulsorily acquired except under the authority of law and only after reasonable notice of the intention to acquire the property has been given to any person owning the property or who will be affected by such acquisition (See section 16(1)(a); Tshuma & Makamure, 1990). The purposes for which land could be compulsorily acquired included the interests of defence, public safety, public morality, public health and town and country planning. Land acquired in this manner should be used for a purpose beneficial to the public generally or a section thereof. The provision further specified that under-utilized land could only be acquired for the settlement of land for agricultural purposes (See section 16(1)(b) of the Public Lands Acquisition Act cap 296 of The Laws of Zambia). The entrenched provision, including the provision that reserved twenty seats for whites, could not be amended before ten years after the implementation of the Constitution.

In 1990 the Constitution, including section 16, was amended to give the state more power to remove some of the restrictive provisions and to give the state more leverage in its authority to compulsorily acquire property for agricultural and resettlement purposes. This amendment affected the requirements relating to payment of compensation. The amendment required that compensation be paid, but that the compensation had to be “fair” and be made available “within a reasonable time”. The amendment implied that “fair compensation” is necessarily less than adequate compensation, which is market related, and that the state would be in a better position to acquire land since it will not be compelled to pay “promptly” but within a “reasonable time”.

The amendment was followed by the Lands Acquisition Act of 1992. Section 3 of the Act empowers the President to compulsorily acquire any land, where:

(1) the acquisition is reasonably necessary in the interest of the defence, public safety, town and country planning or the utilization for that or any other property for a purpose beneficial to the public generally or to any section of the public;

(2) any rural land where the acquisition is reasonably necessary for the utilization of that purpose or any other land –

(i) for resettlement for agriculture or other purpose; or

(ii) for purpose of land reorganization; and

(iii) for the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred in sub paragraph (i) and (ii).

The new Lands Acquisition Act provided for compensation, but for fair compensation within a reasonable time, and it also brought in the concept of deprivation (In the case of *Davies v Minister of Lands, Agriculture and Water Development* 1996 (9) BCLR 1209 (ZS), the Supreme Court of Zimbabwe in its interpretation of s 11(c) of the Land Acquisition Act, chap 20: 10 (Zimbabwe) drew a distinction between an acquisition and deprivation and held that s 11(c) did not afford protection against deprivation of property by the State where the act of deprivation fell short of compulsory acquisition or expropriation. It further held that no compensation was required for a deprivation of rights in property and that it was not every deprivation which amounted to a compulsory acquisition of property. Nor did every deprivation require that compensation be paid.).

After the referendum that rejected the draft constitution, the constitutional provisions relating to land acquisition were amended to include some of the provisions of the draft constitution (See section 3 of the Constitution of Zimbabwe Amendment Act 16 of 2000). The amended law makes provision for compensation, but compensation is not automatic. It gives the government the power to compulsorily acquire agriculture land for the resettlement of people in accordance with the programme of land reform. This

position is informed by the principles that are also reiterated in the 2013 Constitution (See Article 72(7) of the Constitution of Zimbabwe Amendment Act No 20) of 2013) that with due regard to the fact that the people of Zimbabwe, as a consequence of colonialism, were unjustifiably dispossessed of their land and other resources without compensation, and consequently took up arms to regain their land and political sovereignty and, therefore, must be enabled to reassert their rights and gain ownership of their land, the Act (See section 16(A) as amended by section 3 of the Constitution of Zimbabwe Amendment Act 16 of 2000) imposes on the former colonial power the obligation to pay compensation for agricultural land compulsorily acquired for resettlement through a fund established for that purpose. Therefore, if the former colonial power fails to pay compensation through such fund, the government of Zimbabwe has no obligation to pay compensation for agricultural land, compulsorily acquired for resettlement. Furthermore, the amended provision states that even where compensation is to be paid, the following factors must be taken into account in the assessment of any compensation that may be payable:

- (a) the history of the ownership, use and occupation of the land;
- (b) the price paid for the land when it was last acquired;
- (c) the cost or value of improvements on the land;
- (d) the current use to which the land and any improvements on it are being put;
- (e) any investment which the state or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;
- (f) the resources available to the acquiring authority in implementing the programme of land reform;
- (g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and
- (h) any other relevant factor that may be specified in an Act of Parliament (See section 16(A)(2) of the Constitution of Zimbabwe as amended by the Constitution of Zimbabwe Amendment Act 16 of 2000).

In 2005 the Constitutional Amendment Act 17 was promulgated. It introduced further amendments to the Constitution. Firstly, the right of persons aggrieved by the government's land policy to have recourse to the courts when their land had been acquired under section 18 of the constitution was removed. It effectively ousted judicial jurisdiction from determining land acquisition disputes. Secondly, two other clauses legitimized prior and current land acquisition without compensation. These were *ex post facto* provisions which were to apply retrospectively, in order to accord legality to illegally acquired/occupied farms. The changes were designed to legitimize the activities during the FTLRP (The Fast Track Land Reform Programme), which were then illegal under law. These amendments were challenged before the regional court, the Southern African Development Community Tribunal (SADC TRIBUNAL). In the case of *Mike Campbell (Pty) Ltd et al v Republic of Zimbabwe* the Tribunal ruled that the white farmers had been racially discriminated against in the execution of the land reform programme and that this conduct of the by the Government of the Republic of Zimbabwe was in violation of SADC principles. It also ruled that the farmers were entitled to compensation for the loss of their land. However, the Zimbabwean Government refused to pay compensation for the land, arguing that the obligation to pay compensation to the farmers rested on the British government, in its capacity as the former colonial power (See section 16A of the Constitution of Zimbabwe and 72(7) of the Constitution of Zimbabwe Amendment Act no 20 of 2013).

The property provisions of the 2013 Constitution (Constitution of Zimbabwe Amendment Act No 20 of 2013) separated property rights strictly so-called from agricultural land (See Sections 71 and 72). Whereas property rights are couched in traditional terms that are protected and justiciable, the provisions relating to agricultural land do not have such provisions. The provisions governing property rights hold that no person may be compulsorily deprived of their property rights unless (1) they are given reasonable notice, (2) they are paid fair and adequate compensation (3) the acquiring authority applies to the courts to confirm the acquisition if it is contested. If the court does not confirm the acquisition, a person may apply to the court for the prompt return of their property. It also allows a person

to challenge in a court of law the legality of the acquisition, the amount of compensation as well as ask for prompt compensation. Section 71 (the Property Clause) provides as follows:

(1) “Property” means property of any description and any right or interest in property.

(2) Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.

(3) Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied –

- (a) the deprivation is in terms of a law of general application;
- (b) the deprivation is necessary for any of the following reasons-
 - (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
 - (ii) in order to develop or use that or any other property for a purpose beneficial to the community;
- (c) the law requires the acquiring authority-
 - (i) to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition;
 - (ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and
 - (iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition;
- (d) the law entitles any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition; and
- (e) the law entitles any claimant for compensation to apply to a competent court for the determination of-
 - (i) the existence, nature and value of their interest in the property concerned;
 - (ii) the legality of the deprivation; and

(iii) the amount of compensation to which they are entitled; and to apply to the court for an order directing the prompt payment of any compensation.

These rights do not apply to agricultural land. Section 72 (Rights to agricultural land clause) provides that:

(1) In this section “agricultural land” means land used or suitable for agriculture, that is to say for horticultural, viticulture, forestry or aquaculture or for any purpose of husbandry, including –

(a) the keeping or breeding of livestock, game, poultry, animals or bees; or

(b) grazing of livestock or game; but does not include Communal Land or land within boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land survey; “land” includes anything permanently attached to or growing on land; “piece of agricultural land” means a piece of agricultural land registered as a separate piece of land in a Deeds Registry.

(2) Where agricultural land, or any right or interest in such land, is required for a public purpose, including–

(a) Settlement for agricultural or other purposes;

(b) Land reorganization, forestry, environmental conservation or the utilisation of wildlife or their natural resources; or

(c) The relocation of persons dispossessed as the result of the utilisation of land for a purpose referred to in paragraph (a) or (b);

the land, right or interest maybe compulsorily acquired by the State by notice published in the *Gazette* identifying the land, right or interest, whereupon the land, right or interest vests in the State with full title with effect from the date of publication from the notice.

(3) Where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2)–

(a) Subject to section 295 (1) and (2), no compensation is payable in respect of its acquisition, except for improvements effected on it before its acquisition;

(b) No person may apply to court for the determination of any question relating to compensation, except for compensation for improvement effected on the land before its acquisition, and no court may entertain any such application; and

(c) The acquisition may not be challenged on the ground that it was discriminatory in contravention of section 56.

(6) An act of parliament may make it an offence for any person, without lawful authority, to possess or occupy agricultural land referred to in this section or other State land.

(7) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors may be regarded as of ultimate and overriding importance-

(a) Under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) The people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) The people of Zimbabwe must be enabled to re-assert their rights and regain ownership of their land;
and accordingly-

(i) The former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose;
and

(ii) If the former colonial power fails to pay compensation through such a fund, the government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

(8) This section applies without prejudice to the obligation of the former colonial power to pay compensation for land referred to in this section that has been acquired for resettlement purposes.

Under the provisions of section 72, the State may acquire agricultural land for a public purpose which includes resettlement. As the acquiring authority, the State must publish a notice in the Gazette identifying the land that is being compulsorily acquired. It also provides that the State will acquire full title in the land with effect from the date of publication of the notice. The existing title deed will be endorsed and cancelled immediately, vesting the title to the land

in the state. The mere publication of the notice completes the process of acquisition. As compared to the Constitutions of other jurisdictions discussed above, persons aggrieved by the compulsory acquisition are not entitled to compensation. Compensation is payable only for improvements. There is no right of access to the courts for the determination of any question relating to acquisition, except for compensation for improvements. The acquisition cannot be challenged on the ground that it was discriminatory. These provisions thus grant constitutional legitimacy to the provisions of the previous constitution that were struck down by the SADC TRIBUNAL for being discriminatory and in violation of international norms and the rule of law.

Consequences of Expropriation and Land Resettlement

The individual's right to own property and the protection of that right are recognised as fundamental rights of the individual under international law. This right can be found in most constitutions and international conventions. Article 17 of the Universal Declaration of Human Rights of 1948 provides that everyone has the right to own property alone as well as in association with others; and no one may be arbitrarily deprived of property. In terms of article 5(d)(v) of The International Convention on the Elimination of all Forms of Racial Discrimination, state parties undertake to eliminate racial discrimination in all forms and to guarantee the right of everyone to own property alone as well as in association with others (See also article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; Article 23 of the American Declaration of the Rights and Duties of Man of 1948; Article 21 of the American Convention on Human Rights of 1969; and Article 14 of the African Charter on Human and People's Rights of 1981). The protection of this right is contained in various provisions such as substantive law provisions; provisions for the payment of compensation; procedural requirements to guarantee the application of the rules of administrative justice in the exercise of the powers of expropriation; and procedural mechanisms meant to safeguard against the abuse of the power to expropriate.

Since this right is recognised as a fundamental right, in most jurisdictions, the right is enshrined and guaranteed by the Constitution and therefore the power to deprive the individual of this right can only be granted by the law on justifiable grounds. It is for this reason that in earlier constitutions the right to expropriate could only be justified on grounds of public utility and was subjected to the purpose limitation in the eminent domain clause. The determination of what constitutes public utility is a political one and therefore, the individual might not be competent to make any pronouncement on the validity of that decision. But the individual must be involved in the process of deciding what property must be subject to expropriation, for example, the individual must be given the opportunity to suggest alternative land equally suitable for expropriation under the public utility justification.

In most Southern African countries that achieved independence through liberation wars, it is common knowledge that colonial land policies and land tenure systems constituted the major causes for the liberation struggles. Therefore, at the time of independence governments had to embark on land reform and resettlement programmes to correct the injustices of the past. In the context of the laws of expropriation the traditional public utility rationale for expropriation was found wanting. The orthodox grounds for expropriation had to be expanded to accommodate resettlement and agrarian reform. In Namibia, for example, land resettlement and agrarian reform have come under the domain of public interest within the context of the provision of article 16 and the government can therefore exercise the powers of expropriation for its resettlement and agrarian reform schemes. Confronted with such onerous provisions justifying the deprivation of his or her rights, the individual can only be assured of equity and justice if the right to compensation is assured.

Since expropriation involves the deprivation of the right of the individual, it is important that procedural mechanisms and requirements are put in place to prevent any potential abuse of the power to expropriate. Mere substantive rules are not enough; procedural rules are equally important. The procedure involved in the process of expropriation therefore becomes a legal requirement in

the sense that it is aimed at ensuring procedural justice, transparency, recognition of the rule of law and the protection of individual rights.

The details of the procedure may vary from jurisdiction to jurisdiction, and stipulated in the relevant legislation, but the most important criterion is that of compliance with the principles of natural justice and reciprocity. For example, this will imply that the individual whose property is to be expropriated is involved, to a certain degree, in the expropriation process and given a fair hearing not only with regard to the amount of compensation but also with regard to the decision concerning expropriation as such is necessary to reduce the possibility of corruption, the irregular promotion of individual interests and the arbitrary use of state power. Article 16(2) of the Namibian Constitution clearly stipulates that the power to expropriate can only be exercised following the promulgation of an Act of Parliament. Therefore, the power becomes statutory and discretionary in nature and must be exercised subject to the provisions of article 18 of the Namibian Constitution which enjoins administrative officials to comply with the principles of natural justice in the execution of administrative and executive powers. This was confirmed in the *Gunther Kessl and Others v Ministry of Lands and Resettlement* (Case No 27/2006 and 266/2006) case by Muller, J. where he held that article 16 of the Namibian Constitution does not stand alone. This means, therefore, that the requirements of article 18 are applicable to the exercise of the powers of expropriation granted to the Minister by the Agricultural (Commercial Land) Reform Act 6 of 1995 and that the conduct of the administrative official, the Minister, must be fair and reasonable, as well as legitimate. The ultimate objective is to ensure that the power to expropriate is not abused. These procedural rules are meant to ensure that in the exercise of the power of expropriation the individual is protected through the due process of law. Under the Namibian Constitution the exercise of this power will be subjected to the provisions of article 18 of the Constitution, which demand the application of the principles of natural justice. The Agricultural (Commercial) Land Reform Act has provisions to that effect. It also contains provisions to ensure that the power to expropriate is not concentrated in the hands of only one person. The power is exercised in consultation with the Land Reform

Advisory Commission and as mentioned earlier, the determination of the amount of compensation, in the event of a disagreement, is subject to the jurisdiction of the Lands Tribunal, which is established under section 63 of the Act.

The two requirements of article 18 are, firstly, that the principle of natural justice must be satisfied in order to ensure some involvement of the owner whose property is to be considered for expropriation and, secondly, that the said owner must be given a fair hearing. This should apply not only in the context of assessing the amount of compensation, but also in the decision to expropriate the property concerned. As stated by Muller, J in *Gunther Kessl and Others v Ministry of Lands and Resettlement* (*Ibid*) before the Minister can take a decision to expropriate, he is duty-bound to apply the principle of *audi alteram partem*. It implies that he must afford the landowner an opportunity to be heard in order to persuade him or her that he should not take the decision to expropriate his property. Subjecting the Executive's power of expropriation to the concept of reciprocity implies justifiability of rights and judicial review of powers of expropriation.

General Application of Limitation Provisions

Since expropriation amounts to deprivation of one of the fundamental rights provided for by Chapter 3 of the Namibian Constitution (article 16(1)), any legislation purporting to vest the power of expropriation in the state or an organ of state must be of general application in compliance with the provisions of article 22 of the Namibian Constitution. In terms of article 22, limitation of any fundamental right or freedom is only lawful if it is provided for in legislation; if the limitation is generally applicable; and not aimed at a particular individual. The latter two requirements were confirmed in the case of *Cultura 2000 and Another v Government of the Republic of Namibia and Other* (1992 NR 110 (HC); 1993 NR 328(SC); 1993 (2) SA 12 (NHC). This principle was also affirmed in the case of *Gunther Kessl v Ministry of Lands and Resettlement and Others* 2008(1)NR 167) with regard to article 22(a).

The Role of the Judiciary

Property rights, land reform and protection of individual rights represent prototypical or classic illustration of the relationship between the three branches of government and more specifically the extent that judiciary can fetter executive powers or powers of Government. These constitutional provisions discussed above can only be meaningful and represent a protection of the rights of the individual only where there is a strong, impartial and independent judiciary that can put restraint on the exercise of legislative and executive powers. This was one of the concerns of the Lancaster House. The Namibian Judiciary in its relatively short span of existence has demonstrated the resolve of its independence from the other branches of government in interpreting the constitution in the purposive manner to uphold the fundamental principles of the Constitution, especially in the area of property rights and land reform. The same can be said of the South African judiciary, especially the Constitutional Court. The history of the post-independence Zimbabwean judiciary demonstrates an example of a judiciary that can be induced to transform from being a liberal protector of human rights to one that is distinctly pro-government in so far as the land reform exercise is concerned (the post 2000 Supreme Court starting from the externally induced resignation of Chief Justice Gubbay)

The Determination of Compensation

Expropriation also involves deprivation of the rights of the individual and more especially his entitlements of ownership, and therefore, both in law and on grounds of equity, the individual must be compensated for his loss. This is a principle recognised under international law as stated in the case of *Texaco v Libya* (as cited above). Most municipal laws authorizing the state to expropriate private property incorporate the right to compensation in the relevant laws. However, the contentious issue has been the determination of the amount of compensation. Under international law compensation has to be prompt, adequate and effective. This

standard is commonly referred to as the Hull doctrine, which is accredited and named after the United States Secretary of State Cordell Hull, who in reliance of the prevailing international norm, wrote his famous letter to the Mexican Government asking Mexico for 'prompt, adequate and effective compensation for the expropriated land of United States nationals. The Hull formula has been translated to mean that compensation should be paid in a currency that can be readily used, reflecting the full value of the expropriated property and incorporating future lost profits and interest, if payment is not effected within a reasonable time after expropriation. This criterion does not, however, find automatic translation and incorporation into the provisions of the municipal legislation which falls under the domain and jurisdiction of the Government of the day.

In Namibia, section 25 of the Agricultural (Commercial) Land Reform Act 5 of 1995 provides for variables to be taken into consideration for the determination of compensation. These include the current value of the property and improvements made by the state. Section 25(1) of the South African Constitution of 1996 gives and protects the rights of the individual to own property. However, section 25(2) empowers the state to expropriate property provided that it is done:

- in terms of a law of general application;
- for a public purpose or in the public interest; and
- subject to compensation determined in the prescribed manner.

The spirit of these provisions is reflected by section 25(3) in terms of which the compensation and the time and manner of payment must be just and equitable and must reflect an equitable balance between the public interest and the interest of those individuals affected by the expropriation. However, notwithstanding this spirit of the compensation provision section 25(3) specifically provides that when compensation is being assessed regard must be had for all relevant circumstances, including:

- the current use of the property;
- the history of the acquisition and use of the property;
- the market value of the property;
- the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- the purpose of the expropriation.

The significance of these factors in the Zimbabwean and South African Constitutions is that in assessing the amount of compensation the court will not only have to use the market value of the property but will have to take these specified factors into consideration.

The payment of compensation is one of the requirements in customary international law for the validity of the power to expropriate private property by a sovereign state. This right to expropriate is within the competence of a sovereign state but the compensation requirement imposes a legal restriction on this competence (In some jurisdictions such as Zimbabwe, South Africa and the USA, the distinction is drawn between expropriation of property and deprivation of property. The former involves the payment of compensation, but deprivation has been held not to involve the payment of compensation. In America, expropriation falls under eminent domain and deprivation is known as police power). In the *Texaco v Libya* ((1977) 53 ILR 389) case the requirement that was adopted as a rule of public international law is that the expropriating sovereign state must pay “prompt, adequate and effective compensation”. The 1962 Resolution on Permanent Sovereignty over Natural Resources also makes provision for the payment of compensation. It provides that in case of expropriation, “the owner shall be paid appropriate compensation”.

In *Texaco v Libya (Ibid)* case it was further stated that the standard of “appropriate compensation” in the resolution “codifies positive principles”, but there is no one uniform standard for the quantum of compensation under municipal law. The expropriation laws of Zambia, Zimbabwe, Namibia and South Africa all make provision for the payment of compensation. In the case of Zambia, the Government was required to pay “adequate compensation” and in

the case of Zimbabwe, the Lancaster House Constitution provided for the payment of “prompt and adequate” compensation. This was amended to “fair compensation” but only for improvements. The South African Constitution makes provision for the payment of “just and equitable” compensation and stipulates factors (See section 25(1), (2) and (3) of the South African Constitution) that must be considered in the assessment of compensation. Article 16(2) of the Namibian Constitution *inter alia provides* that the state may expropriate property “subject to the payment of just compensation”. One is therefore obliged to come to the conclusion that the amount of compensation is a political decision within the competence of the government of the day. If this is accepted as a valid conclusion, this matter must be justiciable. The jurisdiction of the courts in this matter must not be ousted.

The Namibian Agricultural (Commercial) Land Reform Act 6 of 1995 (See section 25(1), (2) and (3) of the South African Constitution) empowers the Minister, upon the recommendation of the Land Reform Advisory Commission, to offer the owner concerned, in the appropriation notice, the amount of compensation for the property which is being expropriated. In assessing the amount of compensation, the Act stipulates under section 25(5)(a) and (b) that the Minister must take into consideration the enhancement of the value of the property in consequence of the use thereof and the improvements made after the date of notice on or to the property in question, provided that the amount does not exceed the aggregate of the amount which the land would have realized if sold on the date of notice on open market by a willing seller to a willing buyer and an amount to compensate any actual financial loss caused by the expropriation (See section 25(1), (2) and (3) of the South African Constitution). The Act also provides that if the parties fail to reach an agreement regarding the amount of compensation, compensation is to be determined by the Lands Tribunal on the application of any party, and resettlement to be effected by arbitration in terms of the Arbitration Act 42 of 1965 (See section 27(1), (2) and (3)). The Act is silent on the individual’s right of appeal to the courts but it does not specifically oust this right either.

Social and Economic Consequences of Expropriation

The decision to expropriate is a political one but it has some legal, economic and social implications that impact not only on the individual but also on the budget of the nation. In Zimbabwe, for example, it was reported in the *The Herald* of 21 August 2000 that over 240 000 farm workers were likely to lose their jobs after the conclusion of the acquisition of over 3 000 commercial farms for resettlement. The paper added, however, that the government intended resettling these farm workers. Furthermore, it must be noted that expropriation without compensation erodes the confidence that the banks have in title deeds. It reduces title deeds to mere pieces of paper.

Conclusion

Under international law, states have a sovereign right over their natural resources. Public international law also recognizes the individual's right to property. The problem that could result from these potentially conflicting rights could be resolved by the application of the principle that the right of the community overrides the right of the individual. On this premise, the power of the state to extinguish the individual's right to property could only be justified on grounds of public utility, and where expropriation is justified on grounds of public utility, the individual must be compensated for the deprivation of his or her rights. The demands of natural justice and equity enjoin the expropriating authority to comply with the principles of natural justice since in essence the right to expropriate is discretionary.

In most Southern African countries that achieved independence through liberation wars, it is common knowledge that colonial land policies and land tenure systems constituted the major causes for the liberation struggles. Therefore, at the time of independence governments had to embark on land reform and resettlement programmes to correct the injustices of the past. In the context of the laws of expropriation the traditional public utility rationale for expropriation was found wanting. The orthodox grounds for

expropriation had to be expanded to accommodate resettlement and agrarian reform. In Namibia, for example, land resettlement and agrarian reform have come under the domain of public interest within the context of the provision of article 16 and the government can therefore exercise the powers of expropriation for its resettlement and agrarian reform schemes. Confronted with such onerous provisions justifying the deprivation of his or her rights, the individual can only be assured of equity and justice if the right to have redress before a competent court is assured. But the protection of the rights of the individual requires the existence of an independent judiciary that is able to fetter the exercise of discretionary powers given to Government.

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- The Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966)
- First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950
- 1962 General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources (GAR 1803); GA Res. 1803 (XVII) / 17 UN GAOR Supp. (No.17) at 15 / UN Doc. A/5217 (1962)
- American Declaration of the Rights and Duties of Man of 1948
- American Convention on Human Rights of 1969
- African Charter on Human and People's Rights of 1981

Legislation (including Ordinances/Resolutions/Proclamations)

India

The Constitution of India, 26 January 1950

Namibia

- Constitution of the Republic of Namibia, 21 March 1990
- Land Reform Act 6 of 1995
- Agricultural (Commercial) Land Reform Act 6 of 1995
- Agricultural (Commercial) Land Reform Amendment Act 14 of 2003

Ghana

Constitution of the Republic of Ghana, 7 January 1993

South Africa

Constitution of the Republic of South Africa, 1996

Restriction of Land Rights Act 22 of 1994

Arbitration Act 42 of 1965

Zambia

Constitution of Zambia 1991

Northern Rhodesia Order in Council of 1924

Public Lands Acquisition Ordinance of 1929

Public Lands Acquisition Act (Public Lands Acquisition Act cap
296 of The Laws of Zambia)

Zimbabwe

Lancaster House Constitution of Zimbabwe, 1980

Constitution of Zimbabwe Amendment (N0. 20) Act, 2013

Lands Acquisition Act of 1992

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Case law

Texaco v Libya 1977 53 ILR 389

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167(HC)

West Air Aviation and Others v Airports Company Limited and Another
2001 NR 256 (HC)

Immigration Selection Board v Frank 2001 NR 107 (SC)

Aonin Fishing (Pty) v Ministry of Fisheries and Marine Resources 1998 NR
47

Davies v Minister of Lands, Agriculture and Water Development 1996 (9)
BCLR 1209 (ZS)

Mike Campbell and Others v Republic of Zimbabwe, SADC (T) No.
2/2007

*Cultura 2000 and Another v Government of the Republic of Namibia and
Other* (1992 NR 110 (HC); 1993 NR 328(SC); 1993 (2) SA 12
(NHC)

Ancestral Land Claims in Namibia: Dispelling the False Narrative

John B. Nakuta

Introduction

It is a notorious fact that colonialism and apartheid in Namibia were synonymous with dispossession. Through the process of dispossession, certain indigenous communities lost their ancestral lands. In this regard, one may be forgiven for assuming that, logically, at the attainment of independence the issue of restitution and land reclamations would have been amongst the prime priorities of the land reform policies and programmes of the new government, as a way to address the sad and unfortunate historic injustice of land dispossession. This, regrettably, is not the case though. The new democratically elected government, instead, adopted a cautious approach to the emotive issue of land restitution and land reclamations. In fact, a consensus resolution adopted at the 1991 Land Conference convened by the new government resolved not to entertain the issue of land restitution and reclamations of ancestral lands given the ‘complexities’ involved in redressing such claims. None of the government’s land reform and land redistribution policies and programmes accordingly make mention of the issue of ancestral land claims.

Twenty six years later, the 1991 Land Conference’s decision in respect of ancestral land, has come to haunt the nation. In recent years the issue of land restitution and land reclamations in Namibia has dominated the public discourse in the country. Representatives from previously dispossessed communities such as the San, Nama, Herero, Damara and Baster communities have begun to openly question and challenge the government’s reluctance to entertain ancestral land claims in the country.

This exposition critically assesses the validity of claims for the restoration of ancestral lands in Namibia. In doing so, it juxtaposes the emotive claim of previously dispossessed communities with the intransigence of the government not to open the proverbial Pandora's Box when it comes to such claims. A rights based perspective is adopted to engage in this difficult, but necessary, exercise. To aid this analysis, the chapter draws inspiration from the recent case handed down by the African Court on Human and Peoples' Rights concerning the indigenous Ogiek people of the Mau Forest in Kenya. The findings of the Court are contextualised to the Namibian situation by way of celebrating the significance of the decision.

The chapter commences with a short historical account on the sad occurrence of land dispossession and seizure as it occurred during colonial times. This is followed with a critical analysis of the government's response to the issue of land dispossession and claims for the restoration of ancestral lands in the country. After this, the argument is extended to debunk the false dichotomy/narrative that the restoration of ancestral lands is not claimable and/or desirable under the Namibian legal system. The last part of the exposition, using the *Ogiek* decision as a point of reference, provides pointers for closing the accountability gap in advancing the restoration of ancestral land claims in the country.

Land Dispossession: the Sad Reality of Namibia's Colonial Past

On the 21st of March 1990 Namibia gained her independence after a long struggle waged against colonialism, racism and apartheid. Namibia, which was at the time known as South-West Africa, was under German colonial rule between 1883 and 1915. Following the defeat of Germany in World War I, the country became a Class C Mandate Territory of the League of Nations. With the dissolution of the League of Nations the country was placed under the trusteeship of the United Nations. Under the mandate the territory was administered by South Africa. South ruled Namibia as its fifth

province. This meant the Namibia was eventually subjected to South Africa's racially discriminatory apartheid policies.

One of the saddest legacies of colonialism and apartheid occurred in the area of land dispossession. In this regard, various historical accounts show how some of the local communities and ethnic groups such as the San, Ovaherero, Namas, Damaras and the Rehoboth Basters were violently dispossessed of their lands. The following paragraphs, by way of background, give a brief account on how some of these communities were dispossessed of their ancestral lands. It is worth stressing that due to space limitation a critical choice had to be made in respect of the communities affected in this regard. This choice does not in any way connote a preference or bias towards such groups. Moreso, the accounts on dispossession are by no means exhaustive but primarily serve to set the tone for the arguments advanced in this exposition.

The ancestors of San and Khoe peoples are generally assumed to be the earliest inhabitants of present-day Namibia (UN Human Rights Council, 2013: paragraph 5). The San is said to have traditionally lived a highly mobile life of hunting and gathering in small family bands (Legal Assistance Centre, 2006: 1). Historic records show that the San communities suffered subjugation and land dispossession from both other ethnic groups and the two colonial administrations. The dominant account from archival records reveals that the San community was adversely affected with the arrival of the Bantu-speaking tribes from north-east Africa and Europeans respectively. The Bantu-speaking migrants were cattle herders. The San, on the other hand, were hunter-gatherers. The settling of these Bantu tribes in San territory made conflict between them inevitable. The arrival of the new migrants threatened the livelihood of the San people. For instance, their cattle ate the grass, destroyed the waterholes, and drove away the game on which the San depended. To add salt to injury, the Bantu peoples, who are physically larger and more powerful drove the San away from their herds thus pushing them to the margins of their own lands (*Ibid*). The arrival of the whites from Europe further exacerbated the marginalisation of the San. The annexation of the Etosha National Park by the colonial administrations best illustrates this.

Archival records shows that the area of Etosha was originally inhabited by the Hai//om, one of sub-groups of the San long before the arrival of the Bantu-speaking groups and the German and South African colonialists. The Etosha National Park, said to be the world's largest natural park is renowned for its wild life and flora and is such considered, for all intents and purposes, as the ancestral land of the Hai//om people. Sadly, that reality was to change as of the 1st of May 1954. On the 30 January 1954 the Native Commissioner of Ovamboland, by order of the Administrator General, informed some 24 men, 33 women, and 35 children from the Hai//om community that they were to leave the Etosha National Park on the 1st of May 1954. The decision to evict the Hai//om was reportedly taken to protect the game species and to provide farmers in the surrounding area with cheap labour. Be that as it may, the records show that the Hai//om people were arbitrarily evicted from their ancestral land, without prior consultation, compensation, and without been provided with an alternative land. In fact, the announcement of the Native Commissioner of Ovamboland regarding their expulsion from Etosha was unambiguous:

[...] if you are still in the Game Reserve on that day you will be arrested and will be put in goal. You will be regarded as trespassers. [...] None of you will be allowed to return [...] I hope you understand this message. If you have something to say I will listen but I wish to tell you that there is no appeal against this order. [...] Convey what you have heard today to your absent friends and relatives (Native Commissioner for Ovamboland, 1954: 2).

This sad historical fact and occurrence, as elaborated by Dieckmann in her doctoral thesis, rendered the Hai//om people landless and relegated them to the margins of white farms around the Etosha National Park where they worked as casual labourers, moving often from farm to farm (Legal Assistance Centre 2006: 15).

The Namas and Herero people lost their land to the Germans colonialists through scrupulous land deals and violent acts of expropriation. The accounts recorded by scholars such as Werner Wolfgang aptly capture this sad historical reality. The work of

Wolfgang is heavily drawn from to elucidate this point. Wolfgang recounts that the German colonialists acquired land by signing protection treaties with indigenous rulers in exchange of land. Exploiting local conflicts, the Germans offered protection to individual rulers against their adversaries. These protection treaties can at best be described as theft by false pretences. They eventually left the indigenous populations without their ancestral lands. For example, by 1893 the greater part of territories occupied by pastoralist communities in the central and southern parts of the country had reported been acquired by eight concession companies. These unscrupulous land deals, unsurprisingly, irked the indigenous populations and spurred the Herero and Nama war of resistance of 1904 (Werner, 1993: 137-139).

This war, as noted by Wolfgang, had devastating consequences for the Herero and Nama communities. It is said that between 75 and 80 per cent of the Herero people, and about 50 per cent of the Nama people were exterminated by the German colonial forces. The affected communities regard these extermination as the first genocide of the time. Following the extermination and indigenous resistance largely crushed the German colonial administration went on to issue ordinances announcing the expropriation of tribal lands. These expropriation orders specifically targeted the lands of the Herero and Nama. For example, the expropriation issued in 1906, as translated by Werner Hillebrecht, provided:

On the basis of the Imperial Ordinance of 26 December 1905, the confiscation of all movable and immovable tribal property of the Herero north of the Tropic of Capricorn, as well as the Zwartbooi Nama of Franzfontein and the Topnaar Nama of Zesfontein is hereby decreed. The Governor may entrust to the use of the affected natives as much livestock as is indispensable for their livelihood. The expropriation ensues because the mentioned native tribes have committed warlike inimical actions against the government of the protectorate, against non-natives and against other natives (Hillebrecht, 2017: 5).

Independence in 1990 brought with it several expectations. Their prime expectation, as rightfully observed by Melber, was for an improvement in their standards of living. Also, that independence

would lead to genuine structural transformation in their hitherto socio-political and socio-economical settings. Similarly, Melber's assertion that the fair distribution of land also featured prominently in those expectations cannot be discounted (Melber, 2017: 6). This begs the question: what has been the government's response to the issue of land seizures and dispossession as occasioned during colonial times?

Government's Response to Colonial Land Seizures and Dispossession

The Namibian Constitution does not contain an express provision on land restitution. Similarly, land is neither framed as a right in Chapter 3 (the Bill of Rights) nor listed as a directive principle of State policy under article 95 of the Constitution. It does, however, guarantees property rights and make allowance for the expropriation thereof. Such expropriations, however, must be done in the public interest and be accompanied with the payment of just compensation. The Namibian property clause, however, falls far short compared to that of South Africa. The SA property clause, in addition to guaranteeing property rights and making allowance for expropriation, is also structured in manner to facilitate land restitution and redress. In this regard, section 25(7) of the South African Constitution in unequivocal terms provides that: "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

Similarly, section 25(5) of the SA Constitution obliges the State to take "reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis". It is worth noting that referencing these constitutional provisions by no means suggests that that country discovered the silver bullet for addressing the complex land issue. In fact, it is common knowledge that some political actors and other activists in that country are calling for the expropriation of land without compensation. Reference to the SA constitutional provisions

serves to emphasise the point that land reform must be done and interpreted from a given context. This is important because rights, as was stressed by judge Yacoob in *Government of the Republic of South Africa v Grootboom*, must be interpreted and understood in their textual, social and historical context (Grootboom 200: paragraph 22). Importantly, it serves to emphasise that the constitutional basis for land restitution and land redistribution in that country is the benchmark against which land reform programmes in that country are measured and judged.

This, sadly, is not the case in Namibia. The issue of ancestral land and land restitution last formerly featured on the national agenda in 1991. In that year, the Prime Minister, now the President of the country, convened a National Land Conference and the Land Question. The conference brought together a broad range delegates from diverse backgrounds. It primarily served as a forum for presenting and discussing land issues and grievances. It also presented delegates the opportunity to review policy and to consider strategy options on land reform (Office of the Prime Minister 1991: 9). The week-long conference adopted various consensus resolutions. Consensus Resolution 2 of the Conference, the one most relevant to this work, provides as follows, “[...] given the complexities in redressing ancestral land claims, restitution of such claims in full is impossible.”

With this resolution Namibia thus adopted a purposefully cautious approach to land reform effectively saying that land reform in the country would not include the restoration of “ancestral lands” (UN Human Rights Council 2013: paragraph 18). The said resolution also informed the content of future legislation and policy in respect of ancestral land. In this context, both the Agricultural (Commercial) Land Reform Act (No.6 of 1995 as amended), and Communal Land Reform Act (No. 5 of 2002 as amended) are conspicuously silent on the issue of ancestral land. The same applies to the National Resettlement Policy. Shockingly, even the 2016 Land Bill does not address the issue of ancestral land. In fact, this Bill contains nothing extraordinary and/or innovative. It primarily seeks to merge to two principal Acts, in a fashion which can at best be described as a copy and paste exercise. The Bill caused much controversy and uproar.

One of the unhappiness centred around its silence on the restoration of ancestral lands. Given the public outcry the President eventually instructed the Minister Land Reform to withdraw the Bill to allow for greater public consultations and input. Similarly, it was also announced that a second land conference will be held in September 2017.

The lack of a constitutional basis for land restitution, and for the land reform programme in general, in my opinion, led to a systematic capture and dilution of constitutional values and standards. Such tendencies, to echo words of Tomasz Koncewicz, can be best referred to as ‘constitutional capture’. “Constitutional capture”, according to Koncewicz, stands for a systemic weakening of checks and balances. It is an encompassing process which: “[...] transforms the concepts that were taken for granted and were part of the liberal narrative like rule of law, legality, separation of powers, independence of the judiciary, supremacy of the Constitution and the monopoly of constitutional review” (Koncewicz, 2016: epilogue).

In my paper ‘On the Side of Justice’ I argued that the notion of ‘constitutional capture’ may as well be used to describe the manner in which land reform is being conducted in the country. That analysis focused on the government’s land resettlement programme. It showed how constitutional values, standards, principles, rights and dictates such as ‘equality and no-discrimination’, ‘the right to reside and settle in any part of Namibia’, and the concept of ‘previously disadvantaged persons’ are interpreted in a narrow and formalistic manner to feed the narrow, and selfish ends of the elite (Nakuta, 2016: 11). This exposition draws on my previous paper, and extends the argument to the suppression of ancestral lands claims in the country by the ruling elite.

That said, land dispossession seems to be conflated with colonialism. One high ranking politician with reference to calls for land restitution and reparation claims against Germany once stated that ‘*we were all affected by colonialism*’, thus implying that there is no need for differential treatment in this regard. Such statements, respectfully, suffer from denialism and are a distortion of the truth. Archival records show that land dispossession as occasioned during the colonial periods mainly occurred in the so-called Police Zone i.e. in

the central and southern regions of the country. The north and north-eastern parts of the i.e. Kaoko, Ovambo, Kavango and the former Caprivi regions were largely unaffected by the events of land seizures and dispossession as occasioned during colonial times (Wolfgang, 1993: 139). It is therefore disingenuous to conflate land dispossession with colonialism.

Claims for the restoration of ancestral lands have also been equated with the abhorrent practice of Bantustans as devised by the then apartheid regime. To this end, the minister of land reform, Utoni Nujoma, is on record for having said that:

The government will not entertain any talk about ancestral land because that would promote Bantustans and tribalism [...] Don't forget we had been fighting for the independence for this country and ancestral land claims are based on Bantustans which we fought against persistently and consistently. So let it be very clear to you who think this government will succumb to reintroduce tribalism and Bantustans (Beukes, 2017: 1).

In stark contrast to his minister's position on ancestral land, President Hage Geingob, in his Independence Day speech welcomed proposals on ancestral land claims. In his address he enjoined the nation to reach national consensus on this contentious issue (Beukes, 2017: 3). This is, indeed, much welcomed. Equating claims for the restoration of ancestral lands with Bantustans is baseless and misplaced. In fact, South Africa, from where the abhorrent practice of Bantustans hails from has gone all out to restore land to those South Africans who can provide proof that they were dispossessed of their land, forcibly removed and relocated during the dark days of colonialism and apartheid. Moreso, whereas Bantustans were about the subjugation and marginalisation of Blacks, claims for the restoration of ancestral lands seek to achieve the very opposite. It is aimed at restoration, redressing the wrong of the past and reclaiming human dignity. Nothing more, nothing less.

From that vantage point, the consensus resolution in respect of the restoration of ancestral land adopted at the 1991 Land Conference was unimaginative. It equated complexity with

impossibility. This is deeply regrettable since no reality is too overwhelming to imagine change. The decision not to restore ancestral land has, in the words of De Villier, simplified the process of land redistribution and made it less legalistic and adversarial. It left, however, a bitter taste in the mouth of those who lost their ancestral lands without any compensation. The call for the restoration of ancestral lands thus therefore remain a festering sore until such time the issue have being resolved (De Villiers, 2003: 45).

What remains is to debunk the false dichotomy that the Constitution and the country's legal regime do not make allowance for restitution and land reclamations.

Debunking the False Dichotomy

The Constitution, as noted earlier, does not expressly make reference to ancestral land and/or the restitution thereof. Despite this apparent constitutional vacuum many commentators have called for this issue to be addressed by the Namibian government. In this regard, the most authoritative call came from the former UN Special Rapporteur on the rights of indigenous peoples, Professor James Anaya. The Special Rapporteur, in his country report on Namibia to the UN Human Rights Council in 2013 called on Namibia, "[...] to provide redress [to indigenous peoples] for any land that has been confiscated, taken, occupied, used or damaged without their free, prior and informed consent" (UN Human Rights Council 2013: paragraph 77).

This question remains though: Can this be done in the absence of a constitutional basis to do so, especially, when viewed against the backdrop that such calls do not enjoy unanimous support? The answer to this question is in the affirmative.

In the case of *Government of the Republic of Namibia v Cultura 2 000* Chief Justice Mahomed pointed out that the Constitution must be interpreted:

[...] broadly, liberally and purposively [...] so as to avoid the "austerity of tabulated legalism" and [...] to enable it to continue to play a creative and dynamic role in the expression and the achievement

of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government (*Government of the Republic of Namibia v Cultura* 2 000: 20-21).

This judicial injunction calls for a move away from a formalistic reasoning to more substantive reasoning as a way to provide a constitutional answer to the conundrum of ancestral land claims in the country. Formalism, as clarified by Hoexter, refers to a judicial tendency which attaches undue importance to the pigeonholing of a legal problem. It over-emphasises the superficial or outward characteristics of a legal problem and place an over-reliance on technicalities rather than substance and common sense (Hoexter, 2004:597). The issue of ancestral lands claims, unfortunately, has fallen prey to such formalistic reasoning. However, the oft cited clarion call issued in the *Cultura 2000* decision requires innovation and out-of-the-box thinking to make the law to contemporary times. This is all the more necessary when it comes to ancestral land claims in the country. Indeed, only a purposive and substantive reading of the Constitution will ensure that claim for the restitution of ancestral lands under the current constitutional dispensation will become a reality.

Additionally, invoking the principle of interdependence and indivisibility of human rights can, and should be used to claim the restoration of ancestral lands in Namibia. Inspiration for this is drawn from the recent case of the African Court on Human and Peoples' Rights in the matter between the *African Commission on Human and Peoples' Rights v Republic of Kenya* (hereinafter *Ogiek* case). Indeed, adopting a rights based perspective for the restoration on ancestral lands will go a long way in closing the accountability gap as intimated by the former Chief Justice in the *Cultura 2 000*.

Closing the Accountability Gap

On the 26th May 2017 the African Court on Human and Peoples' Rights (hereinafter the Court) issued a landmark judgment which heralds a great victory for marginalised communities across Africa. The case centred on the routines evictions of the Ogiek people from

the Mau Forest by the Kenyan government on the purported justification that such evictions were prompted by the need to preserve the natural ecosystem of the forest.

The African Commission on Human and Peoples' Rights (hereinafter the African Commission), which brought the case on behalf of the Ogiek people, argued that the evictions violated several rights of the Ogiek people as guaranteed under the African Charter on Human and Peoples' Rights (hereinafter the African Charter). For the avoidance of doubt, the alleged violations were, specifically, article 1 (the duty to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the Charter), article 2 (the right to non-discrimination), article 4 (the right to life), article 8 (the right to profess and practice a religion of one's choice), article 14 (the right to property), article 17(2) – the right culture and (3) - the obligation of the State to promote and protect the morals and traditional values of the community, article 21 (the rights to freely dispose of their wealth and natural resources), and article 22 (the right to development of the Charter).

The Court found that the routine evictions of the Ogiek people violated all, but one, of the rights complained of. It was only respect of the right to life that the Court found no violation. This was mainly as a result of the lack of evidence to proof the allegation as it pertains to the eviction of the Ogiek people (*African Commission on Human and Peoples' Rights v Republic of Kenya* 2017: 38-65).

This judgment is of great significance for the advancement of indigenous peoples' rights in Africa. For this reason, certain provisions of the decision will hereafter be scrutinised and contextualised to the Namibian situation. To this end, the provisions of the decision dealing with i) the clarification of the concept of indigenous people, ii) the temporal application of the Charter, iii) the right to property as it pertains to indigenous people, and iv) the right to non-discrimination.

Clarifying the Concept of 'Indigenous People'

Before dealing with the merits of the case the Court found it necessary to first determine whether or not the Ogiek people

constitute an indigenous population. Such a determination, crucially, would determine whether or not the Ogieks people could claim the rights associated with such a status as recognised under by the Charter and international human rights. The recognition of their status as an “indigenous people” forms part of such rights.

The concept of indigenous population is not defined in the Charter or international law. In fact, the African Commission emphasised that a definition is not necessary or useful as there is no universally agreed definition for the term. It also holds the view that no single definition can capture the characteristics of indigenous populations. To fill this void, the Commission through its Working Group on Indigenous Populations/Communities adopted a set of criteria which allows for the identification of the indigenous populations and communities in Africa. These constitutive elements or characteristics are:

- a) “Self-identification;
- b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;
- c) A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model” (African Commission on Human & Peoples’ Rights, 2007: para.10-12).

These constitutive elements or characteristics read together with the work of the United Nations Special Rapporteur on Minorities guided the Court in making a determination as to the whether or not the Ogieks constitute an indigenous population. In applying these and other factors to the instant case, the Court, found sufficient which confirmed that the Ogiek people: 1) have priority in time with respect to the occupation and use of the Mau Forest; 2) exhibited a voluntary perpetuation of cultural distinctiveness through self-identification as a distinct group; 3) that they suffered from continued subjugation, and marginalisation as a result of evictions from their

ancestral lands and forced assimilation; and, lastly, 4) that the recognition of their status as a tribe or indigenous population attest to their persistent marginalisation.

Following these deductions, the Court recognised the Ogiek people as an indigenous population that is part of the Kenyan people. This recognition entitles them a particular status i.e. ‘indigenous people’ deserving special protection by virtue of their vulnerability (*African Commission on Human and Peoples’ Rights v Republic of Kenya* 2017: 103-112).

This part of the ruling is of great significance for Namibia. In Namibia the recognition of indigenous status remains a conceptual challenge. The Government’s approach, as reported in the 2013 Human Rights Baseline Report of the Ombudsman, has been to regard all black Africans or descendants of those who lived in areas that were invaded by colonial powers as indigenous people (Ombudsman, Namibia 2013: 81). This, needless to say, serves a major hindrance for advancing ancestral land claims in the country.

The Court’s endorsement of the constitutive elements/characteristics of indigenes of the African Commission bears great significance. It most certainly gives credence to the Commission’s assertion that whilst any African can legitimately consider him/herself as indigene to the continent not all Africans qualify for ‘indigenous peoples’ status. In Africa, the concept of indigenous people/populations bears a special human rights meaning. Crucially, it does not mean “first inhabitants” in reference to aboriginality as opposed to non-African communities or those having come from elsewhere (African Commission on Human & Peoples’ Rights, 2007: paragraph 13). Indigenous people status, in Africa, is determined with reference to those criteria as stipulated the African Commission, and now endorsed by the Court.

This ruling will go a long way in dispelling the notion that ancestral land claims cannot be entertained in Namibia on the grounds that all African are indigenous to the continent. Importantly though, those planning to claim their indigenous peoples’ status and the concomitant rights and protection which accrue thereto, will first have to proof the elements for ‘indigenous peoples’ status as was done in this case. .

Temporal Jurisdiction

The principle of non-retroactivity, as embodied in article 28 of the Vienna Convention on the Law of Treaties of 1969, generally, applies to international treaties. Kenya became a State party to the Charter on 10 February 1992 and thus argued that its obligations under the Charter became enforceable only as of this date. It thus argued that the allegations made by the Commission on behalf of the Ogiek people against it can therefore not be adjudicated by the Court.

The African Charter, indeed, does not apply retrospectively. Be that as it may, under international human rights law a party to a human rights instrument may still be held liable for violations which occurred prior to the ratification of such an instrument, where the effects of such violations have continued after its ratification, or where the State party either continued the perpetration of the said violations, or did not remedy them. The Commission argued that the effects of the past discriminatory practices against the Ogieks were persisting, that it continued even after Kenya ratified the Charter and its Protocol, and that the Kenyan government, in fact, continued the perpetration of rights violations against the Ogiek people. The Commission thus invoked the continuing violation doctrine to rebut Kenya's objection to the Court's temporal jurisdiction to hear the application.

The Court's ruling on this matter was quite straightforward. It found that although the evictions by the Kenyan government began before Kenya became a State party to the Charter (on 10 February 1992) and a Party to the Protocol (on 4 February 2004) the alleged violations persisted/continued. This was sufficient to grant the Court temporal jurisdiction to hear the matter (*African Commission on Human and Peoples' Rights v Republic of Kenya* 2017: 62-66).

The issue of temporal jurisdiction will most certainly feature prominently as one of the procedural hurdles which will be encountered in any legal challenge in respect of the restoration on ancestral land in Namibia. The Constitution of Namibia, like the African Charter, is not retrospective in its operation. Additionally, some government officials have questioned the rationale of holding the Namibian government responsible for the acts of land

dispossessions which took place during colonial times. Undoubtedly, invoking the continuing violation doctrine, as was done by the Commission on behalf of the Ogiek people, can and should also be invoked in the Namibian situation. Some indigenous communities, specifically the San continue to face challenges as a result of their historic marginalization (UN Human Rights Council 2013: paragraph 17). There is thus a strong argument to be made that the continued subjugation and marginalisation experienced by these communities is in violation of Namibia's human rights obligations under its own Constitution and the various international human rights instruments it signed up to.

The Right to Property

This part of the decision is equally of great significance for advancing a claim for the restoration of ancestral lands in Namibia. The Court made it clear that the right to property is an individual rights as well as a collective right. Thus, article 14 of the Charter, which, guarantees this right must also be read apply to groups or communities.

Furthermore, article 14 must be read together with article 26 of the UN Declaration on the Rights of Indigenous Peoples (hereinafter UNDRIP). Article 26, importantly, recognises the right of indigenous peoples to the lands, territories and resources they traditionally owned, occupied, used or acquired. It further recognises the rights of indigenous people to own, use, develop and control such lands, territories and resources which they traditionally owned or traditionally occupied. It then imposes an obligation on States to give legal recognition to such lands, territories and resources of the indigenous community with due respect to such a community's relevant customs, tradition and land tenure system (UN Declaration on the Rights of Indigenous, 2007: article 26).

The Court found that reading article 14 of the Charter together with article 26(2) of UNDRIP, in particular, require an expansive meaning of the right to property as it pertains to indigenous peoples. Property, therefore, in the context of indigenous people, necessarily, refer to the lands, territories and resources they traditionally owned,

used and acquired. The right to property as it pertains to indigenous people, accordingly, refers to their right to use, transfer/dispose, possess, occupy, use/utilise their lands, territories and resources.

Building on its earlier finding that the Ogieks constituted an indigenous community who occupied of the Mau Forest the Court from time immemorial, the Court further found that they accordingly have the right to occupy their ancestral lands, as well as to use and enjoy the said lands as part of their right to property.

Article 16 of the Constitution of Namibia, as noted earlier is *prima facie* narrow in its scope. In fact, many commentators have lamented that it mainly protects private property. However, the purposive reading and interpretation given to the right to property by the Court provide great relief for those who may want to claim their ancestral lands as part of the right to property under article 16. Namibia ratified the UNDRIP. Article 26 of the UNDRIP, accordingly, forms part of the country's body of law according to article 144 of the Constitution. This article, significantly, affirms that all treaties binding upon Namibia, as well as "general rules of public international law", are incorporated into Namibia domestic law. This part of the judgment, undoubtedly, can be used in support of the Hai//om peoples' ongoing claim of the Etosha National Park.

Non-discrimination

Discrimination has been variously defined by different international, regional and national human rights bodies and instruments. There is, however, a striking overlap in these instruments in respect of what constitutes discrimination, when and why it occurs, and the impact thereof. For instance, the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No.20 defines discrimination as:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the

recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (CESCR, 2009: paragraph 7).

Importantly, article 2 of the African Charter prohibits any discrimination in the enjoyment of the protected rights on the non-exhaustive grounds such as race, ethnic group, colour, sex/gender, language, religion, political or any other opinion, national and social origin, economic status and birth.

The Court in this instant case found that the Ogiek people have been subjected to differential treatment. For example, other groups falling in the same category of communities such as the Maasai have been recognised as tribes. Such recognition, however, has not been accorded to the Ogieks despite their consistent requests for such recognition pre-dating independence. The Court accordingly ruled that the refusal of the Kenyan government to recognise and grant the same rights to the Ogieks due to their way of life as a hunter-gatherer community amounts to ‘distinction’ based on ethnicity and/or ‘other status’ in terms of article 2 of the Charter. It further found that there was no reasonable and objective justification for the lack of recognition of the Ogieks’ indigenous or tribal status and denying them thereby the associated rights derived from such status. All this thus amounted to a violation of article 2 of the Charter (*African Commission on Human and Peoples’ Rights v Republic of Kenya* 2017: 136-146).

The issue of non-recognition of some indigenous communities has also been a sore point in Namibia. The non-recognition on the Khwe San is a case in point. The Khwe San have since 1997 been applying for recognition of their traditional authority without success. They have instead been placed under the jurisdiction of the chiefs of other traditional communities. Representatives of the Khwe in 2012 informed the Special Rapporteur on the rights of indigenous people during his country visit that these chiefs do not represent their interests. They that these chiefs discriminate against them, and, in fact actively resist the confirmation of their traditional authority (UN Human Rights Council, 2013: paragraph 53). The reason for the non-recognition of the Khwe’s traditional authority is reportedly because they do not have their own land. They, however, reject such

assertions and, in fact, claim the area which they currently inhabit as their ancestral land. Indeed, archival records lent support their claim in that: “[...] from 1938 onwards the area was recognised as the traditional homeland of the Khwe” (Dieckmann *et al*, 2014:367). Whatever the reason(s) for the non-recognition of the Khwe San as a distinct traditional community can, and should be challenged as discrimination as proscribed under article 10 of the Namibian. In article 2 of the Charter and some of the various other international human rights instruments Namibia ratified and/or acceded to must also be relied upon to strengthen such a challenge.

Lastly, there is also a strong case to be made that the government’s unwillingness to entertain ancestral claims amounts to indirect discrimination against those groups who suffered land dispossession and seizure during colonial times. Indirect discrimination, according to the CDESCR, refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of rights (CESCR 2009: par.10(b)). Addressing the land injustices of the past, as a logical corollary, requires that the government must, necessarily, design special measures to address the land question of those indigenous communities who lost their ancestral lands during colonial times. Doing such, will be consistent with article 23 of the Constitution which makes allowance for affirmation action. This article provide scope for the government to design and implement policies and programmes which are aimed at redressing social and economic disparities in the country which arose from past discriminatory laws or practices. In this context, it is worth stressing that the term “non-discrimination” does not “[...] signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment” (Committee on the Elimination of Racial Discrimination 2009: paragraph 8).

Sadly, communities who suffered land dispossession and seizure during colonial times are, hitherto, not listed as a priority group in the various land reform programmes of the government. In fact, the laws, policies and practices view and threat them, with the exception

of some of the San groups, as any another previously disadvantaged Namibian interested in acquiring land. Why this is the case, given the past reality of land dispossession is mind-boggling, to say the least. The government is well advised that:

“To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same” (*Ibid*).

Conclusion

The exposition, as shown in the foregoing paragraphs is, unapologetically, biased towards the restitution and land reclamations of ancestral land in Namibia. It is therefore in full support for the restoration of such as called for by previously dispossessed communities in the country. Further to this, the conclusion of the analysis is equally unequivocal. The suppression of ancestral land ancestral claims by the Namibian government is not only short-sighted, unsound and a recipe for civil strife, but is also incompatible with its obligations to respect, protect and fulfil the rights of indigenous people as guaranteed under international human rights law.

In as much as the Namibian Constitution does not expressly provide for the restitution of ancestral lands, inspiration is drawn from the *Ogiek* case of the African Court on Human and Peoples’ Rights that existing provisions of the Constitution can, and must be interpreted in purposive manner so as to advance the rights of indigenous people.

Those who suffered land dispossession and seizure are entitled to own, use, develop and control the lands, territories and resources they traditionally owned or traditionally occupied during colonial times. This is an alienable right entrenched under international human rights law which Namibia signed up to. It is not case of charity depending on the goodwill of the ruling elite. This *Ogiek* case made this very clear.

What remains is to educate and sensitize government officials, as the primary duty-bearers, on their obligations to respect, protect and fulfil the rights of indigenous communities in Namibia. Indigenous communities, as rights-holders, on the other hand, must similarly be educated, sensitised, and empowered about to rights. The restitution and land reclamations of ancestral lands in Namibia, thus, call for the adoption of a human rights based approach as a way to achieve the desired social justice for those who suffered land seizure and dispossession during colonial times.

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The Land Issue and the Intricacies of Uranium Mining in Namibia: An International Law Perspective

Christian Harris

Introduction

The land issue has been a topical issue in Namibia, as it has been in the rest of Africa. At the centre of the land discourse has been the continued exploitation of natural resources obtained from Namibia's land by multinational corporations with little or no beneficiation accruing to Namibian citizens (Warikandwa & Asheela, 2017: 237; Warikandwa & Nhemachena, 2017: 355; Kisting, 2017: 39; Nhemachena & Warikandwa, 2017). Namibia is a resource rich country owing to the mineral resources which are found in its land. It is therefore not surprising that Namibia is among the top producers of uranium in the world and this valuable but highly contentious mineral has often threatened the sovereignty of the state. With land and the natural resources extracted from it being a source of physical war, lawfare, and economic warfare in the 21st Century, world powers have predictably continued to register their vested interests in Namibia's uranium in one way or another. Initially the British, the French, Australians and even the Iranians have had a large stake in the country's uranium mines. With the recent opening of Husab mine, China has signalled its intention to challenge the hegemony held by the West on Namibia's uranium mines.

The interests of western countries in Namibia's uranium mines are entrenched in their multinational corporations: Areva (France), Rio Tinto (Britain), Weatherly (Australia), Valencia (Canada) etc. Yellowcake Uranium mined from the Namib Desert is used to power stations in the United Kingdom, Japan and other nuclear power states of the west. In an effort to maximise government and ordinary Namibians' benefits from uranium mining (a mineral resource

extracted from Namibia's land), the Namibian government declared it a strategic mineral.

However, the scramble for Namibia's uranium, just like the contemporary land grabs in Africa by multinational corporations, has the potential to ignite a fierce competition between rival powers and the consequences of which has the potential to threaten the sovereignty and territorial integrity of the country. In Africa, so-called strategic minerals have far and large proved to be more of a curse than a blessing. Superpower politics and rivalry over the continent's resources have caused more harm to African countries than good. Will this curse also befall Namibia in the long run?

The History of Uranium Mining in Namibia

Africa contains some of the world's greatest deposits of Uranium and Namibia is among the continent's top producer of this important resource. Despite the abundance of Uranium deposits in the country's desert, the history of uranium mining is a recent phenomenon when compared to other parts of Africa.

Captain Peter Louw discovered radioactivity in the vicinity of the current Rössing mine in 1928. Anglo American Corporation subsequently carried out exploration in the area, but it was not until Rio Tinto acquired the exploration rights in the 1960s that a number of low-grade alaskite ore bodies were identified along the north side of the rugged Khan valley. After extensive test work, construction of the current Rössing mining plant and the development of the open pit started in 1974, with commissioning taking place in 1976 (Plate 4.1). Full production was only achieved in 1979 due to major teething problems in the plant (Background and History of Uranium Mining in Africa; 2011: 2-4).

Namibia's potential as a global supplier of uranium is the most significant, at 8% of world production: its two operating mines namely Rössing and Langer Heinrich and between them they could provide 10% of global output (Dasnoi, 2012: 6). In the decade ending in 2010 uranium production in Namibia increased by 60% (from 2 714 tU to 4 496 tU) (WNA, Uranium Production Figures, 2001-2011) with an estimated 284 200t/U in reserve, making up 4.5% of the

world total (WISE-Uranium, New Uranium Mining Projects - Namibia 2017 - Potential resources are calculated at \$260/kg U). Ownership of Rössing Uranium Ltd (Rössing mine) is shared between the Anglo-Australian multinational Rio Tinto Group (68.6%), the Iranian government (15%), the Industrial Development Corporation of South Africa (10%) and the Namibian government (3%). Paladin Energy Ltd, based in Subiaco, Western Australia owns Langer Heinrich; and the French-owned industrial group Areva NC will extract uranium from the Trekkopje mine from 2013. Namibian uranium deposits are also attracting attention from Chinese, Indian, Russian, and other Australian interests (WISE-Uranium, New Uranium Projects - Namibia 2017).

Major Uranium Mining Players in Namibia

Some 66, mostly foreign companies from Australia, Canada and China companies have EPLs for uranium exploration in Namibia, mainly in the coastal Erongo Region (Al Jazeera Report, 2011).

Rössing

Rössing Uranium Ltd was formed in 1970 (now 68.6% Rio Tinto, 15% Iranian Foreign Investment Co., 10% Industrial Development Corporation of South Africa, 3% Namibian government). The company has mined the deposit from 1976 as a large-scale open pit in very hard rock. Rössing has nominal capacity of 4000 tU/yr and to the end of 2011 had supplied 101,123 tU. Annual production is tabulated above. Production for the first nine months of 2016 was 1131 tU (Uranium mining in Namibia 2017).

Langer Heinrich

Paladin's Langer Heinrich is 50 km south-southeast of Rössing, in the Namib Park, and 80 km from the coast. It was bought by Paladin Resources Ltd (now Paladin Energy) in 2002. The open pit mine commenced operation late in 2006 with 1000 tU/yr capacity. The ore occurs over 15 km in a palaeochannel system, some 50m deep. Some vanadium is present in the carnotite mineral. There is a conventional hard rock mill with an alkaline leaching circuit (*Ibid*).

Husab

Swakop Uranium started development of the mine in February 2013, and production commenced at the end of 2016, and will ramp up to 5700 tU/yr. Swakop Uranium is now 90% owned by Taurus Minerals and 10% by Epangelo Mining Co. Taurus is 60% owned by China's CGN-Uranium Resources Co (CGN-URC) and 40% by China-Africa Development Fund, set up by China Development Bank in 2007. In July 2014 CGN Global Uranium Ltd (CGU) was incorporated in the UK to sell Husab uranium on the world market (*Ibid*).

Omahola

Australia's Deep Yellow Ltd, through wholly-owned subsidiary Reptile Uranium Namibia, is focused on the Omahola Project. It includes the high-grade Inca primary uraniferous magnetite deposit at about 200 metres depth, the Ongolo Alaskite 10 km away, and MS7 Alaskite in between and possibly connected to it. An acid leach mill near the Ongolo Alaskite deposit was envisaged treating ore from Ongalo and MS7 Alaskite deposits and the INCA uraniferous magnetite deposit, all mined by shallow open pit (to 200 m) (*Ibid*).

Tumas

Deep Yellow/Reptile's Tumas project takes in a major palaeochannel and has three zones stretching over about 30 km southeast of Omahola. At 200 ppm cut-off, Tumas has 3320 tU measured resources and 1855 tU indicated resources (Oct 2016, JORC-compliant). In May 2016 beneficiation results using Marenica Energy's *U-pgrade* process were reported for bulk samples from Tumas. Scrubbing produced good liberation of carnotite, then gravity separation gave process feed grade of 1.3% U₃O₈ (*Ibid*).

Trekkopje

Areva's Trekkopje is about 80 km northeast of Swakopmund, and 35 km north of Rössing. In 2007 UraMin Inc. announced an upgrade of uranium resources at this project, comprising two adjacent palaeochannel deposits (Klein Trekkopje being the main one) over an area about 16 km by 1 to 3 km. The company was then

taken over by Areva to become Areva Resources Southern Africa, with subsidiary Areva Resources Namibia developing the mine (Areva 100%) (*Ibid*).

Advantages of Mining Uranium Namibia

Namibia appears to be popular amongst the exploration companies for a range of technical, financial and regulatory reasons. The ore bodies are all found on or close to the surface which allows open cast mining; while the ore grades are not as high as those found in Niger, they are high enough to make large-scale mining economically viable; the infrastructure, although stretched, is considerably better than that found in many other African countries; the mines are located close to a port facilitating the import of process chemicals and the export of yellow cake; and there is a relatively straight forward regulatory framework in place to manage and control uranium mining and all related impacts (Background and History of Uranium Mining in Africa, 2011).

Disadvantages

Negative factors however, include an inadequate supply of naturally-occurring water in the central Namib and desalinated sea water will be expensive; regional power shortages; crumbling road infrastructure (many of the roads in the area were not built to accommodate heavy vehicles); port congestion and delays; overburdened health and educational facilities in the local towns; and a shortage of skills and government structures which have limited capacity to cope with the uranium rush. Many of these constraints can be addressed through a combination of political will, policy coordination, competent governance, proactive planning and government spending (*Ibid*).

The Importance of Uranium to the Global Economy *vis a vis* Politics

Uranium products are some of the most valuable and most sought after on the global markets and their importance to the global economy and geopolitics cannot be understated. Namibia and other

uranium producing countries are thus important players in this phenomenon.

According to Dasnoi (2012: 6) interest in nuclear power has greatly increased over the past decade, for a number of reasons. First, global demand for energy is growing rapidly. World primary energy demand is expected to grow by 40% from 2007 to 2030 and demand for electricity will increase by 76% over the same period. Secondly, rising concern about climate change is encouraging the search for energy sources with lower carbon emissions. At present, nuclear power is the only such source that could adequately meet global demand (*Ibid*). Thirdly, the world supply of uranium is sufficient to meet government concerns over security of supply; uranium supply is less uncertain than that of, say, oil and gas. Fourthly, over the past decade fossil fuel price rises and price volatility have increased the relative cost-efficiency of nuclear power. Fifth, because the main cost in producing nuclear power lies in building the power plant itself, not in buying the uranium (as opposed to energy derived from fossil fuels, where the larger investment is in oil or coal as fuels) countries investing in nuclear power are less exposed to long-term raw material price fluctuations (World Nuclear Association, 2017).

To prevent the misuse of uranium products globally, the International Atomic Energy Agency (IAEA) was formed to this effect. It is the world's centre for cooperation in the nuclear field and seeks to promote the safe, secure and peaceful use of nuclear technologies. The International Atomic Energy Agency (IAEA) is the supranational international organisation with great influence on all forms of uranium mining in Namibia. Pursuant to comprehensive safeguards agreement, the agency conducts various on-site inspections and visits. Activities performed to verify compliance with the norms set by the IAEA can include:

- Auditing the uranium mining company's operating and accounting records and comparing them with reports send to the agency by the Namibian Government;
- Verifying the uranium inventory and any changes from the declared state
- Taking environmental samples

- Applying surveillance and containment measures (Pietrzela, 2013).

Mineral Resources under International Law

According to Walde traditionally, international law has taken a “hands-off” approach to mining. It is a general principle of international law that nation-States have sovereignty that is, supreme, independent political and legal control -over their own natural resources (Wälde, 1992: 327). Principle 21 of the Stockholm Declaration invokes the sovereignty doctrine in no uncertain terms as follows:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

However, Walde concedes that individual state sovereignty over resources is no longer an absolute. International constraints have developed and are continuing to develop in three ways: (1) the bedrock international environmental law principle that States are responsible for preventing transboundary environmental harm to other States, (2) the undertakings and agreements of specific treaties and (3) the emerging principles of sustainable development (Walde 1992).

The Concept of Territorial Sovereignty

The sovereignty principle has been underlined among the principles considered by the classical international law as a basis of relations among states. The sovereignty has at the same time been considered as one of the essential or fundamental characteristics of a state (Milosevic, 2000: 427).

The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein (Jennings & Watts, 1992: 125).

The 20th century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane. In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organisation. It is also inappropriate (*Ibid*).

Therefore sovereignty as supreme legal power and authority is inapplicable to the position of states within the international community: no state has supreme legal power and authority of other states. Thus the relationship of states on the international plane is characterised by their equality and independence and in fact, by their interdependence (*Ibid*).

Three International Law Principles Relevant to Host States Benefiting from their Mineral Resources

(a) Self-determination

According to Carley (undated: 1-4) Self-determination as a political force in international society is a relatively recent phenomenon, emerging in the aftermath of World War I and the breakup of the Ottoman and Austro-Hungarian empires as a demand of national groups seeking to divide territory. President Woodrow Wilson was the statesman most closely identified with the self-determination principle, though ironically the term does not appear in his “Fourteen Points” speech. While he referred to minority rights within a larger state, however, he rarely mentioned the establishment of new, independent states.

Self-determination became officially sanctioned after 1945, when it was included in the United Nations Charter, though it applied to existing states, not to peoples or national groups. However, self-determination quickly evolved from a principle to a right, especially

after the 1960 UN Declaration on the Granting of Independence to Colonial Peoples, when the term came to denote decolonization. Still, self-determination applied to territories and not to peoples (*Ibid*). Moreover, by putting together the three elements of process, freedom and the will of the people, and taking into account the distinction between its rhetoric and political application, self-determination may summed up as:

A doctrine concerning the legitimacy of political institutions, which asserts a process by which nations and peoples based on their free will attain, maintain and enhance their self-realisation and freedom by the organisation and practice of those institutions (Quoted in Summers, 2004: 41).

Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to self-determination. The article states that:

The article states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

(b) Permanent Sovereignty over Natural Resources (PSNR)

The creation of new states in the period of decolonization urged the development of a principle which encompassed their various

demands and interests. Rooted in the right of self-determination and with the primary aim of enabling economic development for developing states, the principle of PSNR builds on traditional state prerogatives such as territorial sovereignty and sovereign equality of states. This permits states to freely determine and apply laws and policies governing their people and territory under their jurisdiction and choose their own political, social and economic systems (Art. 2(1), Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082; Corfu Channel (Merits) (*U.K. v. Albania*), 1949 ICJ 4, p. 35 (Judgment, Apr. 9); Island of Palmas (*U.S. v. Netherlands*), 2 Reports of International Arbitral Awards 829, pp. 838-840 (Award, Apr. 4, 1928); Cassese, 2005: 48-52; Brownlie, 2008: 289-291).

According to Garufu (2015) the PSNR principle has been affirmed in a number of international legal instruments, including the most recent ICJ decision in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment 2005 ICJ Reports 168. Generally, see also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, ICJ, 18 September 2002. See generally Doyle 2004: 151). The PSNR principle is grounded on two key concerns; namely, economic development and self-determination of developing states. It should also be noted that the PSNR is not a stand-alone principle (*Ibid*). Rather it is reinforced by the principles of non-intervention (non-interference) and self-determination (*Ibid*).

While in human rights law, the beneficiary of PSNR is peoples by virtue of their right to self-determination, the doctrine of PSNR has evolved towards promoting the understanding that control over natural resources is reserved for States (Duruigbo, 2006: 37). The assertion that PSNR is an attribute of State rather than a right of the peoples is the result of an ambiguous phrasing of most documents referring to PSNR in international law which underlines the right of peoples and nations to permanent sovereignty over their natural

wealth and resources but at the same time confer on States the right to exercise sovereignty.⁵¹

(c) Non-intervention (non-interference)

In international law, the principle of non-intervention includes, but is not limited to, the prohibition of the threat or use of force against the territorial integrity or political independence of any state (Article 2.4 of the Charter). The principle of non-intervention in the internal affairs of States also signifies that a State should not otherwise intervene in a dictatorial way in the internal affairs of other States (Wood undated: 1).

Legal Regimes Regulating Mining in Namibia

Namibia's mining sector is currently about 12,5% of GDP, making it the top contributing sector, followed by tourism and fisheries, and stakeholders are confident that this sector will continue to grow as it has over the past 27 years since independence. (Hartmann 2017: 7). According to the National Planning Commission (NPC) forecast, the mining sector's contribution to GDP is targeted to reach 15,2% in 2022 from the current 12,5% under the fifth National Development Plan (NDP5). Mining's contribution includes royalties and taxes, improved employment conditions as well as foreign direct investment (Hartman 2017: 8).

As important as it is to the country's economy which is often described as fragile, it is vital for the state to enact laws and policies that are aimed at regulating this vital sector of the said economy.

The Namibian Constitution is the supreme law governing all the country's mining activities. All pieces of legislation and policies derive their authority from the Constitution. Article 100 of the Namibian Constitution states that, "Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned".

The Namibian Ombudsman under article 91(c) is mandated to protect the environment in a variety of ways. The Ombudsman is an

independent state official with the power to investigate complaints concerning Government or the Constitution. One of the Ombudsman's functions is to investigate complaints about the over-utilisation of living natural resources (such as plants and animals) the irrational exploitation of non-renewable resources (such as diamonds or natural gas) the degradation and destruction of ecosystems failure to protect the beauty and character of Namibia. The Ombudsman can take a variety of steps to remedy such problems, including negotiation between the parties concerned and court action. (Guide to the Environmental Management Act No 7 of 2007. Available online at:

[http://www.met.gov.na/files/downloads/a7e_Guide%20to%20the%20Environmental%20Management%20Act%20no%207%20of%202007%20\(GE\).pdf](http://www.met.gov.na/files/downloads/a7e_Guide%20to%20the%20Environmental%20Management%20Act%20no%207%20of%202007%20(GE).pdf)

Article 98 (1) of the Namibian Constitution reads: "The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians."

The Minerals (Prospecting and Mining) Act

No person shall carry any reconnaissance, prospecting or mining operations in Namibia except in accordance with licences granted.

The Minerals Development Fund Act

This Act establishes the Minerals Development Fund and it is another vital piece of legislation governing mining activities in Namibia. Its main purpose is to safeguard the production and earning power of the mining sector through, amongst others, diversification of the production base and supporting the sector through improving national geological and mineral data and expanding training facilities and programmes.

The Minerals Policy of Namibia

This policy has 12 objectives which are mentioned below:

1. Promote and stimulate investment in exploration and mining so as to discover new ore deposits that will lead to the development of new mines and also to maintain the existing ones;
2. Promote a conducive environment for the mineral sector that encourages and facilitates the active participation of all stakeholders;
3. Promote and encourage local participation in exploration and mining;
4. Promote and encourage maximum local beneficiation of mineral products to ensure that as many of the economic benefits as possible are retained in Namibia for the benefit of all its citizens;
5. Regularise and improve artisan and small-scale mining so that it becomes part of the formal mining sector;
6. Promote research and development for improving technology in exploration, mining and mineral processing operations
7. Ensure the establishment of appropriate educational and training facilities for human resources development to meet the manpower requirements of the minerals industry;
8. Promote and facilitate marketing arrangements to increase the economic benefits of the sector;
9. Ensure the adherence to the principle of socio-economic empowerment through appropriate measures;
10. Ensure compliance with national environmental policy and other relevant policies to develop a sustainable mining industry;
11. Review on a regular basis the legal, economic, social and political aspects of the Minerals Policy, to ensure that it remains internationally competitive, that it adequately addresses the mining industry's volatility and that it serves the common good of Namibians; and
12. Ensure mining operations are conducted with due regard to the safety and health of all concerned.

The Policy for Prospecting and Mining in Protected Areas and National Monuments (1999) provides as follows:

- Granting of [Exclusive Prospecting Licenses and Mining Licenses]:
- Is generally permitted in Protected Areas and National Monuments . . .
- . except areas within parks and monuments, which are particularly

sensitive or are of special ecological or touristic importance. Each application would be considered on a case by case basis.

The Policy further states that:

A full EA will usually be required for any prospecting or mining in a Protected Area and/or National Monument. The EA shall be conducted according to the procedures as stated in the Environmental Management Act. Should the [Minerals (Prospecting and Mining Rights) Committee] agree to recommend approval (after reviewing the EA) an Environmental Management Plan and an Environmental Contract shall be concluded before prospecting or mining may commence.

Environmental Management Act

The Environmental Management Act has three main purposes:

- (a) To make sure that people consider the impact of activities on the environment carefully and in good time;
- (b) To make sure that all interested or affected people have a chance to participate in environmental assessments;
- (c) To make sure that the findings of environmental assessments are considered before any decisions are made about activities which might affect the environment.

Declaration of Uranium as a Strategic Resource

The Namibian Government in 2011 declared certain minerals as controlled and high value minerals or strategic minerals. These strategic minerals include uranium, gold, copper, coal, diamonds, and rare earth metals. They are declared strategic minerals in the interest of Namibia's mineral resources and national development towards the realization of Vision 2030 (Katali, 2011: 2-4).

The Cabinet of the Republic of Namibia decided that the right to own licences for the strategic minerals should only be issued to a State owned company. Cabinet, therefore, directed that after

approval of the licence by the Minister of Mines and Energy, the State-owned company may enter into joint ventures with interested parties for exploration and development (Katali, 2011).

The Rationale for Namibia's Declaration of Uranium and other Minerals as Strategic Resources

The mining sector is a significant contributor to Namibia's economy. The sector accounts for 25 percent of national income and 15 percent to the gross domestic product. However, the mining sector's contribution to government revenue is not commensurate with its share to the gross domestic product. Such contribution is mainly through royalties levied on the market value of the minerals. This means that Namibia benefits from its natural endowment mainly through rent-seeking. This situation is untenable (Katali, 2011).

Since the mining sector is dominated by foreign multinational corporations a disturbing phenomenon has developed whereby ownership of the Namibian resources is sold through licences internationally on the back of the Namibian government through speculative activities without government deriving any benefits through sales taxes, values added taxes, or stamp duties (Katali, 2011).

Direct State Involvement in Mining Activities

The declaration of Uranium as a strategic mineral by the government necessitated the need to form a wholly owned state enterprise to directly benefit the state financially. Epangelo mining company was established to this effect. Article 100 is further supplemented by Chapter 11 of the same Constitution. Chapter 11 deals with the principles of state policy and under article 95 (1) obliges the state to take a direct role in the mining activities for the benefit of its people. (Article 95 (i) of the Namibian Constitution) Epangelo mining company is a state entity established by the state for the government to play an active role in the exploitation of the nation's mineral resources. It operates under various mineral policies and regulations such the Minerals (Mining and Prospecting) Act No.

31 of 1992 and Mineral Policy of 1998 respectively (The rationale for the establishment of Epangelo mining, Available online at: <http://www.epangelomining.com/wp-content/uploads/2016/04/Epangelo-Mining-Profile.pdf>)

It is befitting to state that Epangelo is formed against the background of fulfilling Namibia's above-mentioned mineral development objectives, including direct participation of the Government of the Republic of Namibia in mining and, subsequently, in the value addition chain of the country's minerals. Epangelo places emphasis on strategic minerals such as diamonds and nuclear fuels but its mandate stretches beyond the confines of strategic minerals and involves interests in exploration of base metals, mining investment as well as trading and beneficiation of mineral products (Rationale for Epangelo mining company formation, *supra*).

Rationales for State Ownership is to maximise value for society, through an efficient allocation of resources. The state should develop an ownership policy that defines the reasons for state ownership, explains the state's role in governance and the roles of the government bodies involved in implementing the policy. Further governments should define the reasons for owning individual parastatals, and public policy mandates should be mandated and disclosed (Weylandt, 2016).

However, the entrance of Epangelo into the mining field has not been without controversies. This so because SOEs have not performed according to the expectation of government and general public. Presidential inquiries on some failed enterprises have revealed poor management, poor leadership, low productivity etc. as the major reasons for their failure. Every year valuable government resources are being diverted from their rightful social and productive expenditure towards saving of some the OEs. Government itself as a shareholder has not benefited meaningfully in financial terms. The current situation with most OEs is counterproductive to the process of national development (Kanguechi, 2007: 7). Critics of Epangelo fear the company will be just another failed entity wasting taxpayer's money.

The Concept of Resource “Curse” and its Relevance to the Namibian Context

The natural resource curse is a phenomenon where natural resource endowed countries experience worse economic and political outcomes than countries with no natural resource endowment (Siegle, 2008: 45-55). It is now overwhelmingly accepted that the origins of the resource curse theory lie in the work of Richard Auty who set forth empirical evidence to prove that ‘[...] not only may resource-rich countries fail to benefit from a favourable endowment; they may actually perform worse than less well-endowed countries’ (Auty, 1990).

The economic impact of uranium mining is controversial, however, precisely because most African countries are at a relatively early stage of development. Niger stands at 186 out of 187 on the UN Development Programme Human Development Index and even South Africa ranks only at 123 (Human Development Reports 2012). Revenues from uranium mining depend on market price, and governments are exposed to price fluctuations. At the moment the uranium market price is stable around \$115/kg, despite the Fukushima catastrophe. Global demand for nuclear power should result in price stability but another accident that might affect uranium prices and, therefore, government revenues from uranium mining cannot be excluded. Most single commodity-dependent economies are grappling with similar issues of how to manage potential commodity price fluctuations (*Ibid*).

According to Hopwood (2013) Namibia is not usually associated with the term ‘resource curse’ (otherwise known as the ‘paradox of plenty’) which is used in connection with countries with an abundance of natural resources, particularly minerals and hydrocarbons, but extreme poverty due, at least in part, to the diversion of extractive industry revenues to a politically-connected elite.

Corruption is not rampant in Namibia’s extractive industries. In fact, confirmed cases of corruption are few and far between. Namibia’s reputation for mostly sound custodianship of its extractive sector was evidenced in the 2012/13 Fraser Institute index which

ranks the world's best mining jurisdictions for mining companies¹. Namibia came 30th on the index – the second best score for sub-Saharan Africa (Botswana came 17th). Namibia's position was a 15 place improvement on its 2011/12 performance. The country received particular praise for providing high-quality data on mineral resources at a reasonable price (Hopwood 2013).

Namibia has not featured in the campaigns of international NGOs like Global Witness, Publish What You Pay, and the Revenue Watch Institute – which seek greater accountability and transparency in the management of oil, gas and mineral resources. Namibia's absence from these 'halls of shame' should not be a reason for complacency. Indeed there are aspects of Namibia's management of its oil, gas, and mineral resources that are at best opaque and at worst highly secretive (Hopwood, 2013).

Dutch-Disease Hypothesis

Related to the resource curse phenomena is the so-called Dutch Disease theory. This hypothesis refers to the adverse consequences of a large increase in a country's wealth. It is the process by which a boom in a natural resource sector of an economy leads to the shrinkage of the non-resource tradable sector. The process may lead to the country specializing in the resource and non-tradable sectors. This makes the economy more dependent and vulnerable to the resource-specific shocks.

Although the disease is generally associated with a natural resource discovery, it can occur from any development that results in a large inflow of foreign currency, including a sharp surge in natural resource prices, foreign assistance, and foreign direct investment (Ebrahim-Zadeh, 2003).

Whose Land is it Anyway?

Uranium mining in Namibia largely takes place in the Namib Desert. The world's oldest desert and the least inhabited part of the country. Ownership of land where uranium mining is taking place is wholly owned by the government by virtue of article 100 of the Constitution mentioned above. However, the indigenous Topnaar/Nama ethnic group has been living in the Namib Desert

since time immemorial. How Uranium mining affects or benefits their livelihood has not yet been established. For the purposes of this chapter, I will discuss the correlation between land rights and mineral resources exploitation in the context of indigenous peoples.

Potential Environmental Impacts on Land where Uranium is Mined

According to Pietrzela (undated: 24) every uranium mining project is situated within a specified area delimited in a mining licence. Mining projects therefore indirectly influence land use patterns through construction of supporting infrastructure. Since the land is used only temporarily by the mining companies, a crucial question is to what extent previous conditions will be recovered after the termination of operations (*Ibid*).

For example, Rossing Uranium states that the mine currently disturbs 2400ha of land. The company claims to have three principal rules regarding the land use-avoidance of expanding the operations on undisturbed areas, mitigation of negative impacts on the already disturbed area and rehabilitation of land (*Ibid*).

Land Rights and Mineral Resources

Skogvang (2013) posits that most indigenous peoples live in rural and vulnerable areas such as the Arctic and the tundra, in deserts, in the high mountains or in the tropics. Lands and natural resources are vital for their livelihood and culture, and social and spiritual well-being. They are therefore, to a larger extent than urban people, dependent on rights to natural resources and the management of natural resources for their subsistence. Because of indigenous peoples' dependence on natural resources, the interest in preserving these resources in a long-term perspective is significant (Anaya, 2004: 141).

According to Johnson (2010) the basic principle in a land ownership system is that any minerals belong to the owner of the land where the deposits are found. This system is derived from Roman law, and is also referred to as an accession system. The minerals are accessories to the land, and therefore from the beginning are owned by the landowner. Prior to the French Revolution, France

followed the accession system to such an extent that the system is sometimes also referred to as the “French” system (Campbell undated 304-310; Mc Dade undated 1-17).

A land ownership system characterised the mining law, for example, of medieval Sweden. The land ownership system has also traditionally been used in the Anglo- American common law countries due to the principle that the owner of the surface is likewise the owner of the subsurface and all that it contains with certain exceptions.

In England, for example, gold and silver belonged to the Crown as part of its royal prerogative. The modern approach is that the rights to a number of minerals are owned or vested in either the Crown or State by common law or statute, or by mineral severance. Mineral severance means that the land interests have been separated, or severed, by deed (contract) leading to separate ownership and rights to surface and underlying minerals (Morgan, 2005). Mineral rights in South Africa up until 2002 were based on land ownership and could be privately owned. This meant that the acquisition of these rights could occur between individuals without State intervention. Today, the new mineral development legislation provides that mineral resources are the common heritage of all the people of South Africa (Johnson, 2010).

Bafokeng and Richtersveld Communities

In the relationship between mining companies and communities, one common source of tension is the perception that the mining company is garnering disproportionate benefit from the mining of minerals underlying communal lands. Another tension arises from the fact that, for their part, communities often see their communal land, and any benefits they might derive from it, as belonging to them, and not to the state. Unsurprisingly, this tension is exacerbated when the community successfully derives benefit from mining operations (Cook, 2013).

The Bafokeng ‘Tribe’

The Royal Bafokeng Nation (RBN) is the ethnic homeland of the Bafokeng people, a Setswana-speaking traditional community. The

term Bafokeng is used to refer both to the tribal grouping as well as the land its members inhabit. The Bafokeng are led by a hereditary *Kgosi* or king. The monarchy covers 1,400km² in the North West Province of South Africa and Phokeng is the administrative capital (Royal Bafokeng nation: available online at: <http://www.bafokengholdings.com/media/images/reviews/pdf/2012.pdf>).

This Tswana sub-ethnic group is often regarded as the richest tribe in Africa and their direct control of some of the royalties generated from platinum mining on their land is among a few success stories in Africa. In 1968, Impala Prospecting Company, a subsidiary of Gencor, entered into certain Notarial Prospecting Contracts with the Bafokeng. Prior to this, Anglo-American Platinum (Amplats) had been the major platinum-producer in South Africa. These two companies broadly represented the interests of English and Afrikaner capitalists, Gencor having originally been the Union Mining Corporation, an initiative (despite its name) of the National Party government to empower an Afrikaner capitalist class. A major shareholder in Gencor is Sanlam, in turn controlled by the Rembrandt group, both bastions of Afrikaner economic power and control. With the acquisition of leases on Bafokeng-owned land, moreover, Impala positioned itself to become the second largest producer of platinum in the world. The capital reserves and mining skills Impala and Amplats introduced to platinum mining led to increased production and unprecedented profits. This development catapulted the Bafokeng into a new, potentially hazardous state of affairs (Manson and Mbenga, 2003).

The Bafokeng tribe's determination to benefit from platinum mining saw the tribe taking the local mining company to court over a dispute over mineral rights and royalties (*Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH)).

After a protracted legal battle the two parties agreed that:

By early 1999, the two parties reached an agreement on the basis on which the litigation between them had been settled. The agreement incorporated the following terms:

- The royalty payable to the Bafokeng would be increased to 22 per cent of taxable income in respect of the Bafokeng First, Second, Third, Fourth and Fifth areas. This replaced the royalty rate of 14.9425 per cent in respect of the First and Second Bafokeng areas and 16 per cent in the Third area ('the Deeps'). The Bafokeng were guaranteed a minimum royalty of 1 per cent of the gross selling price, which would apply if the royalties payable were less than the minimum royalty.

- The Bafokeng would receive one million shares in Impala Platinum Holdings, thus enabling them to participate in the growth potential of the group.

- The Bafokeng could nominate one person to sit on the Board of Impala Platinum.

It has been speculated that the World Economic Forum, the United Nations, and the World Bank all follow the Bafokeng approach to combating "the resource curse" with interest. With its relatively small area and population and its impressive resources and professional competencies, the Bafokeng Nation aspires to more than providing for people's basic needs. Environmentally sustainable mining, the mass enrolment of girls in sports, early-childhood education, and decentralized HIV/AIDS treatment programs are only some of the localized answers to deeply entrenched problems that might yield far-reaching solutions (Dugger, 2010).

The Richtersveld Community

The *Richtersveld* is an area of land situated in Namaqualand, in the Northern Cape Province of South Africa, close to the border with Namibia. The Khoisan inhabited this area for time immemorial. The *Richtersveld* community still occupies the land in a similar way as their forefathers did (Timmers undated). In 1847 the land was annexed by the British Crown, however the people of the Richtersveld continued to exercise their beneficial occupation, which included the right to exclude others from their land. In 1925 diamonds were found and the government claimed the land as Crown land. Since then the

Richtersveld people were denied access to the land. In 2000 they brought their claim to the LCC in terms of the Restitution Act. The land claim relates to a narrow piece of land presently owned by the first appellant, Alexkor Ltd. The community claimed their land in terms of section 2 of this Act, according to this section the claimants had to prove that they had a right in land at the time of dispossession. The claimants stated that they have (a) a right to the subject land based on ownership, alternatively (b) a right based on aboriginal title giving them the right of beneficial occupation and use, alternatively (c) a right in land obtained by beneficial occupation of the subject land for a period longer than ten years prior to the dispossession (Pienaar, 2008: 5). The LCC held that the community did qualify as a community for purposes of the Restitution Act, however the claim was dismissed on the grounds that the claimants were dispossessed for the purpose of mining of diamonds and not because of racially discriminatory laws or practices (Smith, 2013: 1-11).

In the last Richtersveld case, the Constitutional Court, ruled that the Nama people had both communal land ownership and mineral rights over their own traditional law, even if it is unwritten, amounts to ‘racial discrimination’ (Fife, 2013: 2-39). The court held that:

The Constitution, while giving force to indigenous law, makes it clear that such law is *subject to the Constitution and has to be interpreted in light of its values*. Furthermore, like the common law, indigenous law is *subject to any legislation*, consistent with the Constitution that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law (Firestone and De Noronha, 2005: 264-265).

Super Power Involvement in the Namibian Uranium Mining Sector: Past and Present

Superpower involvement and their quest for geographic dominance played itself in Namibia’s uranium mines during South Africa’s occupation of the territory. According to Hecht (2010) from the moment it opened in 1976, Rossing symbolised the capitalist world’s complicity in maintaining apartheid in southern Africa. Although illegal by a United Nations decree, the mine supplied large

quantities of uranium to nuclear weapons and power plants in Europe, Asia, and the US.

The then liberation movement South-West Africa People's Organisation (SWAPO) opposing Rossing's operations offered a means of recruiting allies from the anti-nuclear and anti-apartheid movements outside Namibia. Activists kept the mine in the international spot light via hearings, publications, and demonstrations, repeatedly invoking apartheid conditions and exposing the transnational web of capital and technology that supported the mine (Hecht, 2010: 215).

To galvanise global opinion in favour of SWAPO, one of the movement's leading technocrats echoed the following statement on the complicity of transnational companies with the apartheid regime:

Our country still languishes under an illegal, colonial occupation, the African masses there suffer daily under political repression and military aggression and the working people of Namibia are held in chains as labour hostages. In the meantime, the racist Boers and the capitalist blood-suckers reap super-profits by the ruthless exploitation of the human and natural resources of our country. The repugnant apartheid colonialism of racist South Africa and the plundering menace of the transnational corporations are the twin evil forces which prevent Namibia's independence. Mercenaries (the filthiest scums of this world, the so-called volunteers) and covert activities are used by the racists, Zionists and imperialists in our part of the world to destabilise independent governments and to sabotage and undermine the armed struggle (Quoted in Hecht, 2010: 151-152).

US-Iranian Nuclear Disagreement at Play in Namibia?

International diplomacy concerning Iran's nuclear program continues to centre on the country's compliance with agreements designed to ensure that peaceful nuclear work is not used as a cover for the development of nuclear weapons. The challenge of discovering what may be going on in Iran is difficult not only because of Tehran's obstructionism, but also because the same technologies,

particularly uranium enrichment and spent fuel reprocessing, can be used for both civilian and military purposes (Henderson and Heinonen, 2013: 9).

With the United States and its Western allies at loggerheads with Iran's nuclear program, the Islamic State's stake in Namibia's uranium mines has placed this African nation in the spotlight. According to a report in the local daily the Iranian Foreign Investment Company (IFIC), which has held the 15 percent stake in Rössing Uranium since the mine was established in the mid-1970s. The IFIC's shareholding dates back to when the mine was financed 40 years ago through a range of finance assistance groups. The IFIC's shareholding was initially held by the Iranian government after which it was transferred to the IFIC in 1997 (Staff reporter, 2016).

How the Iranian government's involvement in Namibian uranium mining will impact the country's relationship with the international community is open to speculation. This is so because there is no existing literature or hypothesis to provide the full impact of such ramifications to Namibia stemming from the Iranian involvement in the country's uranium mines.

Conclusion

Uranium mining in Namibia has shaped the socio-economic and political landscape of this Southern African nation for decades since its discovery in the Namib Desert in the first half of the 20th century. Undoubtedly, royalties from Uranium mining have greatly benefited the economy of the country and unlike in some African countries, this mineral has not resulted in the so-called "resource case syndrome". However, Namibia's reliance on this 'strategic' mineral may lead to the Dutch syndrome hypothesis as discussed in this chapter, thus affecting economic growth in the long run. The establishment of Epangelo mining company against the background of fulfilling Namibia's mineral development objectives, including direct participation of the Government of the Republic of Namibia in mining and, subsequently, in the value addition chain of the country's minerals though a good idea, is still without controversy. The appointment of its managers is shrouded in secrecy and this may

in the long run lead to corruption and usher in the ‘resource curse’ syndrome afflicting other resource rich African states. A very scary scenario indeed! Uranium being a global strategic mineral has the potential to make Namibia a playground for super-power politics. Chinese, British, Australian and French companies/firms are heavily involved in Namibia’s Uranium mining and a combination of these countries with competing interests in a developing country is a recipe for disaster. The Iranian nuclear crisis pitting the Islamic regime versus the USA and its allies have placed Namibia in the international spotlight as the Iranian government owns 15 percent stake in Rössing Uranium since the mine was established in the mid-1970s. It is not known for certain whether Namibian uranium has found its way in Iran’s alleged nuclear weapons factories. Nevertheless, the bottom line is that Namibians must benefit from the minerals that are extracted from their land.

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Evaluating Namibia's Indolent Land Supply and its Effects on Access to Housing: A Law and Economics Perspective

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Introduction

The process of industrialisation has posed significant challenges in many African countries (Hove *et al*, 2013; Berger, 2006; Outtara, 1997). Namibia is not an exception. Industrialisation often brings with it rapid urbanisation (Lehmann, 2015; World Economic Forum, 2015: 31) - a process which places a significant strain on affordable land and housing provision. The rapid urbanisation process implies that fast developing African countries technically should accommodate an estimated 50 000 migrants on a daily basis for the next 50 years (United Nations Department of Economic and Social Affairs Population Division, 2011). In the case of Namibia, migrants could either be Namibian nationals moving from rural to urban areas in a quest to realise their right to property (housing) as set out in Article 16 of the Namibian Constitution, as a symbol of unyoking themselves from the crippling effects of apartheid/colonisation. Apartheid/colonisation excluded many Namibian indigenes from participating in the economic mainstream and realising substantive socio-economic/socio-legal transformation oriented property rights. To that extent, access to housing should be regarded as a fundamental component for realising socio-economic/socio-legal transformation in Namibia.

Apart from localised Namibian migrants, the term migrants could also be extended to refer to new non-Namibian immigrants who enter into the country for mainly employment and/or business related reasons, and seek to stay temporarily or permanently in the

country (Docquier & Rapoport, 2007). Such highly qualified/exceptionally skilled immigrants elect to buy property to cushion themselves against exorbitant rental costs associated with Namibia, in particular Windhoek (New Era, 2016). The movement of the exceptionally skilled immigrants is often informed by the demand for their skills in Namibia (Office of the President National Planning Commission, 2012) and general contemporary migration policies which promote the free movement of persons/labour as a fundamental feature of regional and global economic integration (Skeldon, 2008). In principle, the skilled immigrants come largely as investors in the highly turbulent Namibian housing market.

The net effect of the internal and external migration patterns in Namibia is that housing prices will escalate, as would rentals, due to a combination of demand and supply factors, and in particular land supply constraints. Restricted land supply through land-use planning regulations increases the demand for housing due to growing populations (Quigley, 2005; Eicher, 2008). With little or no evidence of affordable large-scale land and housing provision in Namibia, government initiated housing programmes end up failing to adequately provide affordable housing or are simply inadequate to scale relative to demand. Current indications are that Namibia's property prices are unlikely to decrease unless over 100,000 housing units are built in the country (FNB, 2015; Sweeney-Bindels, 2011; Shinovene, 2015; Summary of Blueprint on Mass Housing Development Initiative in Namibia, 2013). A study that was conducted in 2010 by the Bank of Namibia indicated an extensive evidence of the national gap between household demand and supply (Bank of Namibia, 2011). In Windhoek, it was estimated that 10,000 housing units would have to be built to alleviate current demand pressures and to normalise prices to approximately N\$400,000 per housing unit (*Ibid*). Therefore, the perception that the supply of land for housing would decrease overall property prices and further decrease the rental costs in Namibia remains plausible.

The current gap between land supply for housing and housing supply and demand can arguably be attributed to neo-liberal economic policies, whereby property development is highly politicised and monopolised (National Land Policy, 1998; Final

Report on Youth and Urban Land/Housing in Namibia, 2015: 51; Hochobeb, 2014). With societies in the world accepting that goods and services they consume are provided through markets, subject to their incomes, it appears that the free market approach to access to housing “affords little room” for the Namibian Government to significantly intervene and regulate land supply and housing markets. Whilst it is accepted that, to a certain extent and in varying degrees, the Namibian Government intervenes and regulates the land supply and housing market, the method and rigorousness of such intervention is subject to much debate. There is always an inherent fear on the part of government that strictly regulating the land use markets for socio-economic/socio-legal transformation purposes will scare away investors. It is in this regard that the law and economics school of thought becomes fundamental. The law and economics school of thought applies the economic theory to the analysis of the law (Posner, 1975; Jolls, Sustain & Thaler, 1998). Economic concepts are employed to evaluate legal rules’ economic efficiency and determine which legal rules ought to be passed. In the 18th Century, Adam Smith analysed the economic effect of mercantilist legislation (Smith, 1950; Satija, 2009). In the contemporary Namibian context, such mercantilist legislation in part refers to the laws regulating land supply and the housing market which limit socio-economic transformation.

The economic analysis of law is divided into two categories: 1) positive law and economics (Ayres & Donohoue, 1987; Leff, 1974; Balkin, 1987) and 2) normative law and economics (Coleman 1982; Hicks, 1939). Positive law and economics employs economic analysis as a mechanism for predicting the effects of different types of laws. A positive analysis of land-market regulation or land-use planning or zoning laws would predict the effect of strict regulation as opposed to flexible regulation. The net effect of the positive law and economics school of thought is that it will explain the reason why Namibia may have to develop socio-economic/socio-legal transformation oriented legal rules in order to address housing shortages emanating from a capitalism induced limited supply of land. On the contrary, the normative law and economics school of thought informs the making of policy recommendations based on

the economic consequences of the Namibian Government's land supply and housing policies. In this regard, the normative law and economics school of thought targets allocative efficiency. Efficiency can be explained through two conceptual constructions. The first construction is what is called the Pareto efficiency. Pareto efficiency refers to a state of affairs in which, without changing a legal rule, its application leads to one person becoming better off without making another person worse off (Chapman, 2005). The second construction is that of the Kaldor-Hicks efficiency in which a legal rule can be efficient if it is made Pareto efficient by some parties compensating others as to offset their loss (Coleman, 1980). The two schools of thought therefore point to the fact that even if there may be land-market regulations in Namibia, prices and land-markets are still influential in determining access to housing in the country. Land-market regulations are limited and controlled by planning decisions on land use and supply, as will be discussed later in this chapter.

The Namibian Government through the Harambee Plan of Action (See Chapter 5 [titled Social Progression] of the Harambee Prosperity Plan, 2016) is actively taking measures to try and address the challenges related to property development in Namibia. In the post-independence Namibia, access to housing is one of the four priority areas of development, along with health, agriculture and education (Namibia Build Together National Housing Program Implementation Guidelines and Procedures, 2007). However, according to Cheshire and Vermeulen, it must be understood that the guiding form of market regulation systems are derived from welfare economics, which is premised on two significant deductions: 1) Subject to specific circumstances prevailing, the outcomes generated by markets are "socially optimal" and "efficient" (Cheshire & Sheppard, 2002; Cheshire & Vermeulen, 2008; Cheshire & Sheppard, 1998); and 2) There is a distinction between efficiency (the best society can do on the basis of the current distribution of incomes and wealth in Namibia) and what is equitable (what the Namibian society might collectively choose as a fairer distribution of income and wealth). The law and economics school of thought provides a rational and/or scientific analysis to the land-and-housing-supply challenges in Namibia today. The challenge, though, is that bridging the gap

between the law and economics school of thought and the ideological base of policy makers in land-use planning is problematic. Land-use planning has its basis in designing and engineering, with its objectives being for all practical purposes arguably utopian (Fitting, 2002; Ganjavie, 2012). However, economics points out a specific distinction between efficiency (the best that the Namibian society can do on the basis of the current distribution of incomes and wealth) and what is equitable (what the Namibian society might on the whole prefer as a just mechanism of distributing income and wealth).

This chapter will also point out that in Namibia, due to a limited land supply, fewer properties are being traded yet demand for properties is ever increasing (First National Bank (FNB), 2012; Mooya & Cloete, 2005). Land delivery has continued to be excessively weak, land prices high and household income remaining relatively low (FNB, 2014; FNB, 2012). This has translated into exorbitant rental costs for non-property owners (Bank of Namibia, 2011; New Era, 2016). Is there anything the Government of Namibia can do as the landowners in terms of Article 100 of the Namibian Constitution? (Article 100 of the Namibian Constitution provides that: “Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.”) This question must be construed from the perspective that increasing land supply and resultantly access to housing in Namibia could possibly contribute to the growth of the national economy (See the Fourth National Development Plan (NDP4) and the Harambee Prosperity Plan (HPP) 2016/17 - 2019/20 for evidence of the Namibian Government’s attempts to address its constitutional obligations. See further the First National Conference on Land Reform and the Land Question in 1991 which adopted the following resolutions: i) emphasis should be placed on land tenure reform and access to all Namibians; ii) excessive, under-utilized land owned by absentee landlords should be expropriated; and iii) foreigners should not be allowed to own land in Namibia).

It is therefore not subject to question that Namibia as an industrialising country is currently grappling with an acute shortage

of housing delivery and excessive rental costs (De Kock, 2014). The negative effect of an arguably “restrictive” land supply policy in Namibia which has translated into supply failing to meet demand in the housing market has remained central to the housing problem (Follow-up Performance Audit Report of the Auditor-General on the Ministry of Regional and Local Government, Housing and Rural Development-Build Together Program for the Financial Years 2006-2008: 30; Delgado, 2014). This chapter discusses the chronic problems related to access to housing and rentals from a law and economics perspective, due to an indolent land supply in Namibia. It proceeds from the hypothesis that if Namibia has a practical housing policy for Access to Land and Housing, then access to housing and affordable rentals should have progressively been realised, over 25 years into the country’s independence. In a constitutionally driven rights based era, a quick supply of land, housing delivery and affordable rentals should be prioritised by the Namibian Government. A debatably tacit inability to address challenges related to land supply, housing delivery and affordable rentals is likely to translate to the perpetuation of neo-liberal economic policies reminiscent of the apartheid/colonial era. Such a development is likely to hamper the realisation of noble policy initiatives by the Namibian Government aimed at redressing inequalities of the past which are indicative of apartheid/colonial segregation policies and laws. The chapter will also offer modest recommendations on how to realise improved access to housing and rentals in Namibia as part of the country’s socio-economic/socio-legal transformation agenda.

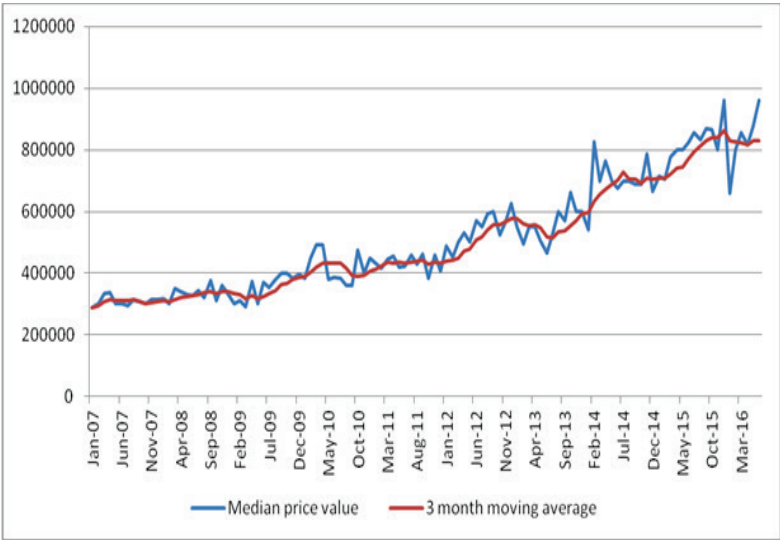
Background and Context

Empirical evidence indicates that, due to industrialisation, African countries are receiving more people in their urban areas - a development which is now causing overpopulation in cities (World Bank, 2005; United Nations, Department of Economic and Social Affairs, 2013). The movement of people is both from within the countries (rural to urban migration) and from other parts of the world such as Africa, Asia, Europe, as well as North and South America (immigration). The ripple effect of this population upsurge is the

“pressure” that is now being placed on governments, the world over, to realise access to housing for their citizens.

Namibia is a classic example of a country which is facing challenges related to the interconnection between land supply and access to housing. It has one of the highest property inflation rates in the world after Dubai. Several metrics can be used to measure the house price growth. Currently, Namibia uses the FNB Housing Index, which calculates the median price of housing on a monthly basis with data supported by the National Deeds office. Despite methodological contentions of whether average prices or median prices should be used for building indices, the overall trend with the data remains unarguable as property prices continue to grow significantly. The prices of houses are exorbitant for most Namibians and foreign nationals resident in the country as indicated by the data in Figure 1 below.

Figure 1: FNB National median house prices



Source: FNB 2016

As Namibia continues to grow and expand its cities and towns, a natural response to industrialisation, the gap between the supply and demand of urban land and housing continues to widen at a rapid rate.

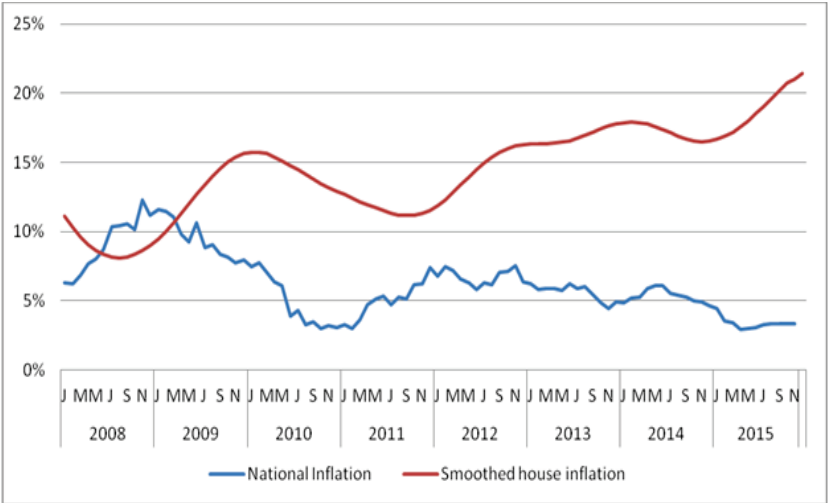
Housing developed and sold through the formal housing market is simply not affordable to the majority of Namibians, hence denying them access to housing. The properties are not affordable for a number of reasons. Key amongst these reasons is the fact that Namibia has one of the highest Gini-coefficient levels in the world (World Bank Gini Index, 2016; CIA, 2014). This suggests that even though Namibia is classified as an upper middle-income economy, it has one of the highest inequality ratios in the world. As such, incomes for most Namibians are not adequate to purchase property, assuming all factors hold constant.

The latest affordability report by FNB examined the level of affordability for the period 2008 to 2015 by creating an affordability index. The index cemented the notion of low affordability by comparing growth in average wages over the given period with average growth in prices. The resulting index suggested that salaries growth paled in comparison to the growth in house prices, thus indicating that levels of affordability have been declining over the years.

The affordability tracker is a ratio comparing per capita real wages to median house prices. It has receded to an all-time low of 0.51 at the end of 2015 based on estimates of income growth between 2007 and 2015. Ultimately, a value of 1 suggests that households are comfortably able to afford the property prices offered at market. 2007 was used as a base year for this measurement, and data suggests that wages would have to increase by 52% or house prices drop by that margin for consumers to have the same purchasing power in the housing market in 2016 compared to 2007.

Apart from the high inequality ratio, the average price of houses in Namibia, measured as a ratio of the gross domestic product (GDP), has continued to rise at a rapid rate. Further, the average house price has remained way above the inflation rate as indicated in Figure 2.

Figure 2: The inflation rate measured against house price growth



Source: FNB 2016

The data presented in Figure 1, the affordability tracker and Figure 2 leads to the irrefutable conclusion that housing is not affordable in Namibia because the fundamental mechanisms affecting housing cost are too prohibitive. For example, the supply of land for housing is excessively limited and therefore scarce. It is also strictly regulated, which therefore makes it expensive on the whole. In addition to the restrictive land supply, another factor impacting negatively on efforts to realise access to housing in Namibia is the issue of land ownership. The Namibian Constitution indicates that the land belongs to the State. It provides that, “Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned” (Article 100 of the Namibian Constitution).

There is no significant challenge posed by the State’s ownership of the land. However, the provision “if the land is not otherwise lawfully owned” raises a fundamental problem. Land ownership in Namibia, as is the case elsewhere in Africa, is informed by diverse

legal regimes relating to land tenure and management, which have their roots in dimensions relating to colonial experiences, contemporary socio-economic and geopolitical factors, and indigenous cultural and normative systems. As such, land rights are highly contested with colonial foreign owners holding the majority share of ownership. This implies that if land supply for property development has increase, the State has to buy land that is “lawfully owned” by colonial foreign owners through expropriation. However, much debate still remains regarding the legitimacy of property rights acquired through violent seizures of land from African indigenes using force by colonialists (Warikandwa & Asheela, 2017: 253).

The Namibian Constitution allows the State to expropriate property subject to just compensation, in accordance with the requirements and procedures to be determined by the Namibian Parliament (See Article 16(1) of the Namibian Constitution). Does the Namibian Government have such resources to pay for the land whose market rates are exorbitant? After all, buying back land “otherwise lawfully owned” on a willing buyer, willing seller basis has not been successful as the colonial foreign owners are not willing to part with the lucrative pieces of land which they guard jealously. The colonial foreign owners understand the economic value of the land and hence do not desire to part with the same. Lack of progress in implementing the willing buyer, willing seller policy has led to militarisation of the dispossessed masses leading to a radical land reform programme in Zimbabwe and “delaying” of the land redistribution exercise in South Africa and Namibia. These complex issues continue to ruthlessly confront the Namibian Government in its efforts to develop and implement urban planning and housing programmes in order to realise socio-economic/socio-legal transformation.

The Recognition of the Right to Housing in International Instruments

Access to adequate and affordable housing is a fundamental human right (The access to adequate housing includes fundamental aspects such as cultural adequacy, habitability, accessibility,

affordability, location, security of tenure and adequate services, materials and infrastructure) (United Nations Habitat, 2015: 3). The realisation of adequate and affordable housing safeguards human dignity. Regardless of the importance of the right to adequate and affordable housing, Namibia, like other developing countries in the world, still struggles with ensuring that all its citizens have access to the aforementioned right. In the world today, an estimated 1 billion people do not have adequate housing and above 100 million people are deemed homeless (Habitat, 2015).

The right to adequate housing is recognised in the Universal Declaration of Human Rights (UDHR) (See Article 25(1) of the Universal Declaration of Human Rights). The same right is also recognised in the International Covenant for Economic Social and Cultural Rights (ICESCR) (Article 11(1) of the ICESCR provides that: “States Parties to the present Covenant recognise the right of everyone to an adequate and standard of living for himself and his family, including adequate ... housing, and to the continuous improvement of living conditions.”) Many other United Nations (UN) instruments acknowledge the right to housing (There are a number of non-binding United Nations instruments (recommendations, resolutions and declarations) which refer to the right to housing as a fundamental human right. The instruments are as follows: 1) The Declaration on the Rights of Disabled Persons of 1975 (Article 9); International Labour Organisation (ILO) Recommendation No. 115 of 1961 (Principle 2); The Declaration on Social Progress and Development of 1969 (Part II, Article 10); The Declaration on the Right to Development of 1986 (Article 8(1)); ILO Older Workers Recommendation No. 62 of 1980 (Article 5(g); UN Commission on Human Rights Resolution 1993/77 on “Forced Evictions” adopted March 10, 1993; UN sub-Commission on the Prevention of discrimination and Protection of Minorities resolution 1994/8 on “Children and the Right to Adequate Housing” adopted August 23 1994; and United Nations General Assembly Resolution 42/146 on the “Realisation of the Right to Adequate Housing” adopted December 7, 1987). Other international instruments which recognise the right to housing include the International Convention Relating to the Status of Refugees (See Article 21), the International

Convention on the Suppression and Punishment of the Crime of Apartheid (See Article II), the International Convention on the Suppression and Punishment of the Crime of Apartheid (See Article 5(iii)), the Convention on the Rights of the Child (See Article 27), and the Convention on the Elimination of All Forms of Discrimination Against Women (See Article 14(2)(h)).

The Recognition of the Right to Housing in Regional Instruments

A number of regional instruments also guarantee the right of individuals to adequate housing. These instruments include the European Social Charter (See Article 31), the Charter of the Organisation of American States (See Article 31(k)), the European Convention on the Legal Status of Migrant Workers (See Article 13), the European Convention on Human Rights and Fundamental Freedoms, the Final Act of Helsinki, and the Resolution on Shelter for the Homeless in the European Community. In Africa, the African Charter on Human and People's Rights (ACHPR) does not specifically refer to the right to adequate housing. Unlike other regional instruments mentioned in this section, the right to adequate housing can only be inferred from the ACHPR. For example, Articles 4 (Article 4 provides for the right to life) and 16 (Article 16 provides for the right to physical and mental health) of the ACHPR give a reasonable basis for the affirmation of the right to housing. However, the adequacy of this approach in a continent saddled with the socio-economic transformation agenda is questionable. A more affirming approach would have been plausible. African governments must be sensitive to the reality that the property rights of indigenes were disrupted by the process of colonisation. Such property rights disruptions could arguably be regarded as the greatest human rights violations which are yet to be legally redressed. Profit maximisation at all costs in the land-markets must not take precedence over the realisation of the right to access to housing. Those that hold vast tracts of land which they do not fully utilise but hold on to for speculative economic purposes, in the neoliberal economic order (New World Order) (Nhemachena & Warikandwa, 2017), must cede

portions of their land in the best interest of African indigenes, subject to expropriation or land reform or restoration. If not addressed, the continued dispossession and/or disruption of indigenes' property rights will lead to the militarisation of communities with the violent seizures of land soon to be the order of the day on the impoverished continent. Evidence of such militarisation of communities for purposes of land grabbing has already been realised in countries such as Zimbabwe and South Africa. Namibia may soon follow the trajectory of Zimbabwe and South Africa if a principled approach to land allocation for property development by indigenes is not adopted.

National Regulatory Framework and the Law and Economics School of Thought

Several constitutions and municipal laws in the world expressly or impliedly provide for the right to adequate housing. The 1996 Constitution of South Africa is a good example of constitutions in the world which expressly recognise the right to housing (See Section 26 of the 1996 South African Constitution). Further, the South African Constitution provides for the justiciability of the right to adequate housing. Any persons who are aggrieved by government's failure to ensure their realisation of the right to adequate housing is expressly conferred legal standing to approach the courts for the enforcement of the right. However, in the case of Namibia, the right to adequate housing is not expressly stated in the country's constitution but is rather implied. By implication, the right is not absolute but subject to the availability of resources, such as land, for it to be realised. Sadly, land is in the hands of a minority who will not let it go as a mechanism aimed at realising the best interests of the majority. Property rights are flaunted as the legal tool of choice to ward off any attempts at land redistribution aimed at redressing colonial injustices which led to the dispossession of the African indigenes.

Article 16 of the Namibian Constitution (which deals with the right to property) provides the key legal basis for inferring the existence of a right to adequate housing. There is also enabling

legislation, such as the National Housing Development Act (National Housing Development Act of 2000), the Local Authorities Act (Local Authorities Act of 1992), the National Housing Enterprise Act (National Housing Enterprise Act of 1993), the Pension Fund Act (Pension Fund Act of 1956), and the Namibia Estate Agents Act (Namibia Estate Agents Act of 1976), which seek to ensure the realisation of adequate housing in Namibia. However, the net effect of not classifying the right to adequate housing in the Namibian Constitution is that the realisation of adequate housing ends up being pursued through national policies such as the National Policy on Housing of 1991 (revised in 2009) and, most recently, the Harambee Plan of Action. The implication of such an approach is that the realisation of adequate housing in Namibia becomes aspirational and non-justiciable as opposed enforceable and justiciable. This development is contrary to the objectives of the ICESCR which provides for the enforcement of the right to adequate housing.

Nevertheless, it has to be clarified that State obligations to ensure access to housing and the right to adequate housing must not be misconstrued regarding their implications. The concepts do not suggest that the government should build houses for the entire Namibian population, let alone provide such houses free of charge. Instead, the realisation of the right to housing by the Namibian Government ought to mean that amongst other things: 1) the government ensures that all Namibians have access to affordable and acceptable housing; and 2) the government adopts measures which indicate policy and legislative recognition of all constituent aspects of the right to housing. This therefore implies that any laws and policies which deny tenure and equal access and rights to land, property and housing must be reviewed. The current housing challenges in Namibia are in part attributed to the slow delivery of land in the country. Such an approach thus leads to the current state of affairs, in which the Government of Namibia faces significant challenges in realising essential elements of its obligations (See articles 2(1) and 2(2) of the ICESCR) to implement economic, social and cultural rights such as the right to adequate housing. The ICESCR identified the following elements as basis for determining the adequacy of the right to housing. The essential elements of adequacy are: 1) cultural

adequacy; 2) legal security and tenure; 3) habitability; 4) location; 5) affordability; 6) accessibility; and 7) availability of services, materials, facilities and infrastructure (See paragraphs 8, 10 and 11 of the ICESCR).

As already outlined in this section, Namibia has a number of laws which impact on the land and housing market. These laws may or may not be economically efficient. To that end, an economic analysis of the laws governing the land and housing market is imperative in order to predict their suitability to growing or shrinking prices of houses in Namibia. Law and economics is one of the most fundamental schools of thought in modern legal theory. The law and economics school of thought has become one of the most important ideological tools to determine the scarcity of a commodity such as houses. Scarcity is one of the fundamental principles of economics which influence the law of supply and demand. Scarcity, also, is central to its three variables, which are supply, demand and price. To that end, the science of economics outlines the good and bad habits and common practices in the land market. It informs the necessary adjustments to scarcity of resources (in their competitions and conflicts imposed upon them by such scarcity thereof). Science of economics is equally translated as a science of the fundamental concepts on which the science of law is also grounded.

The use of the law and economics school of thought to measuring the effects of local land-use regulation on housing prices is therefore important yet challenging. Land-use rules (1) recognise local external factors, (2) give facilities that render communities attractive, and (3) make housing prices higher (Quigley & Rosenthal, 2005). On the other hand, rigid zoning and growth control regulations result in a lagging housing expansion and greatly reduce the net densities of houses (*Ibid*). As such, limited supply of land would be expected to increase house prices on the market. This supply-price nexus, however, leads to the issue of classifications of land-use regulation (*Ibid*). The different land-use regulations make it difficult to unravel the link between regulation and its economic effects.

There are five classifications of land-use regulations, as advanced by Deakin. He classified them as follows: 1) limits and geographic

preferences on the density and intensity of development; 2) cost shifting from the locality to the developer; 3) design and performance standards for the lots and buildings; 4) withdrawal of land from developable supplies; and 5) direct and indirect controls on growth, applied against buildings and population (Deakin, 1989). Downs has also given different forms of regulations, such as environmental protection and land-use restrictions. Of note, Downs points at three different types of cost-increasing effects on housing prices, such as: 1) delay in land supply; 2) direct restrictions on the supply of housing units and land usable for housing; and 3) direct cost increases (Deakin, 1989; Downs, 1991).

Nelson also provided another mechanism of classifying land-use regulation called “urban containment” (Nelson, 2000a). Urban containment emanates from the need to make development more compact and to preserve agriculturally and environmentally rich sources of open space (*Ibid*). To that end Nelson advanced three containment systems: 1) “isolated” containment which leads to displaced construction beyond the metropolitan region; 2) “closed regions” beyond which development is prohibited; and 3) “open regions” which do not prohibit any development in areas further than them (Nelson, 2000a: 3; Nelson, 1988).

The land-use regulatory categories include residential development areas, commercial/industrial development areas, land planning, service capacity restrictions, development impact coverage and adequate public facilities requirements (Nelson, 2000a: 3). Glickfield and Levine established six patterns of growth control which are: 1) floor space control; 2) population control; 3) infrastructure control; 4) political control; 5) zoning control and 6) general control (Glickfeld & Levine, 1992). More significantly though, Glickfield and Levine pointed out that local growth control is a response to regional growth more than local growth. As such growth control does not stop growth because: 1) regulation cannot compete with external population pressures; 2) regulations are local whereas growth is regional; and 3) political compromise results in robust talk in ordinances and plans yet weak enforcement of the regulations adopted (*Ibid*).

Whatever the nature of national land-use laws may take, it must not be forgotten that the national context must not be forgotten. It is a reality that Namibian indigenes were dispossessed of land, a development which is at the centre of the country's contradictions. The dispossession of indigenes' land rights has been cemented by racial land-use laws which continue to deny the majority of the dispossessed Namibian indigenes of their right to and access to housing. As already pointed out in this chapter, adopting the willing buyer, willing seller mechanism to realise land redistribution will not work as the foreign owners of the land are fully cognisant of the economic value of the same. As such, land-use laws in Namibia may need to be revised to address the challenges posed by an indolent supply of land for property development. If this is not addressed, the neo-liberal economic order will continue to prevail at the expense of the dispossessed indigenes.

Current Namibian Context Regarding Housing Shortages

The realisation of access to housing and access to land are cross-cutting issues. It may be argued that without land (Werner, 2003), there might be no access to housing in Namibia and therefore no justice for the Namibian indigenes. Whilst it is accepted that land should "belong to all those that live it", to marginalise indigenes from access to land at the expense of minority foreign owners sit on vast tracts of prime commercial land is simply unjustifiable. This reasoning thus calls for a greater focus on land as a key component to realising international human rights. So important is the land discourse that there are proposals to recognise the human right to land (See the *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Miloon Kothari, 31, 33 UN Doc. A/HRC/4/18 (Feb. 5, 2007). See also International Land Coalition 2009 Conference, Kathmandu Declaration: Securing Rights to Land for Peace and Food Security, April 23, 2009; and Economic Social Council, Development Cooperation Forum, Annual 2008 High-Level Segment Ministerial declaration. UN Doc. E/2008/L.10 28 (July 3, 2008)). Even though international human rights instruments are yet to recognise the human right to land, it is

evident that access to land translates into the realisation of fundamental human rights, amongst them the right to adequate housing. Land-use planning policies and regulations therefore have the effect of negatively or positively impacting on underlying human rights, such as the right to adequate housing and/or access to housing in general.

Land is therefore an indispensable and adequate condition for realising the right to adequate housing and/or access to housing. In principle, “land is life”. This serves as reason why the Kari-Oca Declaration and the Indigenous Peoples Earth Charter were unanimously signed by indigenous groups from Africa, Asia, Europe and the Pacific. The Kari-Oca Declaration aims at maintaining indigenous people’s inalienable rights to land and territories as well as their resources. The Declaration further stresses that indigenous people were the exclusive owners and primary beneficiaries of indigenous knowledge and folklore, and that all forms of misappropriation, whether discriminatory depiction or commercial exploitation, “must cease”. The Indigenous Peoples Earth Charter places emphasis on the fact that indigenous people were placed on earth by God the creator and can therefore not be separated from the land they were put on (Article 31). The Indigenous people’s land rights are thus regarded as inalienable together with their resources emanating from the land (Article 33).

Sadly, regardless of the existence of the Kari-Oca Declaration and the Indigenous Peoples Earth Charter, Namibia is suffering from a housing supply deficit arguably characteristic of the colonial era. The housing supply deficit has been fuelled by a capitalism induced indolent land supply process. At the centre of the housing supply deficit have been issues of growth management policies, neoliberal economic policies, and alleged land-market manipulation. These aforementioned issues have raised debates to the effect that there is a need to examine the relationship between the quantity of new land supply and the growth in house and land prices in Namibia. This has led to the commonly held and contemporary perception that the solution to accessing adequate and affordable housing is to release a large-scale of newly sub-divided and serviced land. It is submitted that stringent growth management policies make housing less

affordable by artificially limiting the supply of land (Morgan, 2008; Demographia, 2007). In essence, there are economic implications for the land-use planning decisions adopted by the Government of Namibia. Such decisions in turn impact on and/or influence the actions of property developers regarding the market value of properties they develop. Stringent land-use planning regulations are likely to restrict land supply over time and make new housing expensive to produce (Nelson *et al*, 2002). This development has knock-on effects on rentals due to the law of supply and demand in that, if the Namibian housing market cannot support higher costs, no new houses will be developed as developers will move to other regions where planning limitations are less restrictive (Bramley & Leishman, 2005).

Counter-arguments to the Land Supply Perspective

There are counter-arguments to land supply being the cause of an increase in housing prices and rentals. Some of the arguments relate to the positive economic influences over housing and development in the long term (Bramley, 1996), consumers allocating more of their income to housing overtime (Richards 2008), and the land leverage hypothesis, amongst others (Bostic *et al*, 2007). This section discusses such counter-arguments.

The Key Housing Price Determinant is Market Demand and not Land Constraints

The sole most significant controlling factor on housing prices with or without growth management measures is the strength of the housing market (Glaeser *et al*, 2006). It is difficult to separate the end products of growth management policies on the prices of houses (Danielsen *et al*, 1999). The complexity is attributed to the discrepancies in, amongst others, the structure of Namibian housing markets, land ownership patterns, policy styles and implementation (Muller, 1995), and how rigid other housing-related local regulations are. Further, urban growth boundaries can affect land values in Namibia (Mooya and Cloete, 2010; Van Gelder, 2009). However, their effects on housing affordability still remain an issue of much

debate. This is because it may be plausible to argue from an economic perspective that the current sharp increases in housing prices in Namibia may be attributed to increased employment, rising incomes and an increased housing demand. By implication the swift increase in jobs and wages in Namibia could also inform the increase in housing prices. The net result of these possibilities is that even though there is a limited supply of land in Namibia, this may not be the reason for high housing prices. Instead the high housing prices may be attributed to growth management policies in Namibia, which increase housing prices relative to demand on the market.

Growth Management Policies and Land-use Regulations Can Raise the Price of Housing

Land-use regulations and growth management policies in Namibia can also lead to a rise in housing prices in varied ways. Land-use regulations and other land-use control mechanisms limit the supply and accessibility of affordable housing (Ikeda & Washington, 2015). This has the effect of raising home prices by excluding lower-income households, which is a true reflection of Namibia under the current circumstances. Growth control and land-use policies such as requirements for low-density-only, bans of cluster homes, and minimum housing size negatively impact on housing supply and affordability (*Ibid*). The aforementioned policies aim at making housing expensive to the extent that it excludes the lower-income earners in Namibia. This marginalisation of low-income earners is a substantial fact regarding the limited affordability of housing in Namibia.

On the contrary, growth management policies have the potential to improve the supply and location of affordable housing (Nelson *et al*, 2002). If drafted appropriately, growth management policies can break the cycle of exclusion of low-income earners from accessing affordable housing. This approach allows for a collective approach realising a mix of housing types and the adoption of policies that increase housing densities. With growth management policies, higher housing prices can be offset by lower transport costs, and better jobs, services and amenities.

Regulation Can Improve Housing Choice Where Housing Prices May Increase in Any Land-use Environment

Affordable housing can be determined by the type of regulation which is implemented with the aim of increasing land-use practices or growth management programs aimed at increasing the distribution of housing in Namibia. Land-use practices tend to be unrestrictive in their approach to realising affordable housing (Gurran *et al*, 2007; Altes, 2006). They zone the low-density areas to include expensive homes which do not include low-income households (Lerman, 2006). Growth management policies, on the other hand, may at times be poorly designed (Levine, 1999). They may allow too much housing growth or they can allow too little growth, which can promote higher housing prices, as is currently the case in Namibia. If growth boundaries are drawn so rigidly and fail to recognise other housing needs, housing supply will fall relative to demand. This development could force housing prices to rise dramatically, and low-income earners would be left without houses or forced to live in crowded areas. If growth management policies are properly designed, they can alleviate the negative effects of the industrialisation-driven growth of communities and the negative price effects on lower-income households (Williamson *et al*, 2010; World Bank, 2011).

However, regardless of the abovementioned views against the link between land supply and adequate housing, much debate on the discourse rages on. Overwhelming evidence still exists indicating that the supply of land remains a key component of addressing the shortage of housing in Namibia (Mwilima, Fillipus & Fleermuys, 2011; Enemark, 2016). Land supply is fundamental to the realisation of adequate housing and lowered housing rentals (Abelsor, 2009).

Recommendations

A number of modest recommendations are advanced in an attempt to address the chronic housing challenges being faced in Namibia. They are as follows:

Improve land supply

Land supply in Namibia has been greatly diminished (Bank of Namibia, 2011). This has been prompted by the lengthy periods it takes for land to be serviced. The limited supply of serviced land, especially in places such as Windhoek, has led to an increase in housing demand (Mitlin & Muller, 2004). The limited supply of serviced land has been attributed to the limited land space, owing to land zoning, ownership of land by private owners emanating from the colonial period, and post-colonial era and limited expertise for land surveying in Namibia. Private ownership makes it expensive for the Namibian Government to purchase the same land from its owners owing to the free market policies which apply in the property market of the country (Bank of Namibia, 2011). Any attempts to address the housing problems in Namibia must ensure that the supply factors are addressed. The Government of Namibia has to generate funds to purchase land from private owners (expropriation) and recruit skilled personnel to survey land (especially in mountainous areas) should outright purchases from private owners not be feasible (Bank of Namibia, 2011). However, the issue of expropriation still remains a contestable issue as some Africans question the wisdom of paying for the land which by right belongs to the Namibian indigenes. After all, the land was violently seized from the indigenes during the colonisation era. One can therefore not assume legitimate rights emanating from an unlawful conduct (Warikandwa & Asheela, 2017). In that case radical forms of expropriation may have to be adopted.

Improve access to housing

Access to housing can only be realised in Namibia if the sharp increase in demand for houses in Namibia is met (Jauch *et al*, 2009). Industrialisation has brought about it a higher number of foreign cash purchasers of houses – a development which also fuels speculative tendencies amongst real estate agents who seek to maximise on the sale of properties. Aside from the issue of foreign cash purchasers of property, rural-to-urban migration has seen cities such as Windhoek growing in population at an estimated 4.5 percent annually (Bank Namibia, 2011; Tacoli *et al*, 2015). The steep rise in

housing demand has led to an equally sharp rise in housing prices and inadvertently led to the skyrocketing of rentals. Rental costs are rising by no less than 12 percent in the current era, as compared to the modest 2 percent in the early 2000s (*Ibid*). The rise in rental prices forces people to opt to buy houses, which are already in short supply – a development which increases demand. For houses to be built, serviced land must be made available by the State. Again land is a central component of improving access to housing.

Use expropriation as a means to increase availability of land for housing

It is evident that a larger proportion of land in Namibia is owned by foreign nationals, which include Germans, Italians, and South Africans, amongst others (Werner & Kruger, 2007). The foreign ownership of land significantly limits the Namibian Government's ability to make land available for property development. As such, expropriation could be pursued as a possible mechanism for increasing the availability of land for property development. However, this approach in the eyes of capitalists could potentially compromise the investor-friendly ratings of Namibia and lead to capital flight and withdrawal of foreign investments. It is therefore up to the Namibian Government to ascertain if they seek to lose their “investors” and avail more land for housing or respect “property rights” and remain faced with the chronic housing shortages due in part to limited land supply for property development.

If the factors that prompt an increase in housing demand are addressed, it is anticipated that the housing challenge in Namibia will be addressed. Market speculation will be greatly limited as supply would have met demand. The Namibian Government through the Harambee Plan of Action has promised to build an estimated 10 000 housing units. Whether this is possible remains to be seen. Perhaps the government must address issues related to the limited land supply before the practicality of realising the 10 000 housing units can be addressed. The tabling of the Land Bill of 2016 before the Namibian Parliament could also come in handy in so far as realising land available for property development is concerned. The Land Bill of

2016 seeks to bar foreign ownership of agricultural, commercial and “communal” lands in Namibia.

Review legal policies

It is necessary for the Namibian Government to introduce new socio-economic/socio-legal oriented transformation laws to regulate the land market. Such a regulatory process should target the limiting of the ever-increasing housing prices in Namibia. The recently introduced Rent Board is a classical example of such regulatory mechanisms which must protect the interests of the previously disadvantaged and currently dispossessed Namibians. However, such regulatory interventions must not be implemented in a manner that maintains a sustainable economic performance of Namibia in the short and long term. Strict regulation of markets chases away property investors and supposedly impedes economic growth. To that extent, a cautious regulatory approach must therefore be adopted whilst bearing in mind the fact that free market policies, if left unchecked, will not lead to an equal/inclusive society envisaged by the Namibian Government. A balanced approach is therefore plausible.

Introduce laws and/or policies to limit market speculation and monopolies

The land market in Namibia must be regulated in a manner that limits speculation. Such land market laws must also target at limiting market monopolies which focus on profit maximisation at the expense of the previously disadvantaged and dispossessed Namibians. Market monopolies drive land prices up, which in turn increases housing prices and rentals. The Namibian Government should seek to break the land-market monopolies and speculative tendencies. Land-market monopolies in particular are the bedrock upon which real estate thrives. Land owners develop properties and sell them to previously disadvantaged indigenes that are desperate for houses. The cost of debt is obscene as illustrated in table 1.

From Table 1, it is evident that stalling land supply benefits those in the real estate business as they will extort huge sums of money in selling properties to desperate home seekers. If land is availed to the

home seekers for property development, those in real estate business would be driven out of business. As such, monopoly over land could be a deliberate ploy to preserve the property development business in the hands of a few well connected indigene elites and their foreign partners. If socio-economic transformation is to take place, land must be availed to the dispossessed indigenes. Monopolies must be prohibited in the property and land-markets of Namibia.

Table 1: The cost of housing debt example

Listing price/purchasing price	N\$ 800,000
Deposit	N\$ 200,000
Bond	N\$ 600,000
Finance	240 months
Annual rate	12%
Monthly payment	N\$ 6, 607
Total	N\$ 1, 585,000 + N\$ 200 000 (deposit)
Interest	N\$ 985,000
Cumulative interest	164%

The Namibian Government must review its growth management policies

It is generally accepted that a shortage in the supply of serviced land in Namibia is attributed in part to growth management policies. From an economic theory perspective, housing supply is low relative to demand. However it must also be accepted that there are a number of other factors which can cause an upsurge in housing prices, such as: 1) the supply and types of housing; 2) the amount of residential choice and mobility in an area; 3) the price of land; 4) the demand of housing; and 5) the growth management policies which differ from region to region in Namibia; hence they are not uniformly implemented and enforced.

Conclusion

Land supply restrictions and/or a shortage of land available for housing in Namibia are a key cause for a sharp increase in housing

prices and rentals (Mwilima *et al*, 2011). Limited land supply is likely to drive housing prices and rentals upwards due to increased demand on the housing market (Baranoff, 2016). Should a land policy be designed to prevent a limited supply of land, then any available land must be developed and property built within a short period of time in order to reduce housing demand in the country (Matthaei and Mandimika, 2014). Regrettably, land supply in Namibia is still limited due to stringent capitalist oriented zoning regulations. Much emphasis has been placed on how land supply affects the realisation of affordable housing and housing prices in Namibia. Land-use planning greatly limits the supply of land for housing. In order to achieve access to housing for all, the Namibian Government must re-evaluate its current and future housing market. Since the Namibian Government has realised that there is a soaring demand for housing, it should consider streamlining its planning procedure and increasing residential zoning areas and the allowable development density through expropriation. Such an approach will allow the Namibian Government to meet future housing demands.

Land-use planning policies may not show immediate effects on the housing markets since housing developers require a lot of time to develop sites into residential buildings. This implies that the negative effects of zoning are not easily picked up. Land is thus continually used without planning permission despite zoning change. To this end, the Namibian Government may have to consider providing incentives to property developers to convert the existing land use for housing where there is need. Should there be a shift in land-use planning, there will be more land available for building houses. This will result in a reduced housing demand on the market and resultantly rental prices. The Namibian Government is thus strongly advised to set up a forecasting model to help estimate the effect of land-use planning policies and regulations in the country. This could possibly lead to the realisation of a suitable balance between the policy and regulation aimed at realising access to housing for Namibians and affordable rentals for those staying on a short-term basis in the country. This way, socio-economic transformation will be realised in an inclusive manner.

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Drawing Lessons from English Equity's "Clean Hands" Doctrine and South Africa's Public Procurement Jurisprudence to Address "Illegal" Occupation of Land: An Assessment of the Legality of the Lenasia Housing Demolition Saga

Tapwa V. Warikandwa

Introduction

Land ownership for property development has long been regarded as one of the key indicators for noticeable socio-economic transformation in post-colonial Africa (Davies, 1989; Bank & Minkley, 2005; Greenstein, 2006; Greenstein, 2004). It must also be viewed as a fundamental component for realising affordable and adequate housing for the dispossessed and impoverished African indigenes. Sadly, the process of supplying land to previously disadvantaged African indigenes for property development, in the post-colonial era, has often been hampered by unrelenting *inter alia* substantial colonially and self-induced problems. Such problems have been fomented by capitalist oriented foreign land owners and inept added to corrupt local or national government officials in Africa. It is unquestionable that land delivery in Africa has been incredibly slow and subject to pugnacious monopoly by an emerging group of corrupt and politically well-connected African elites largely known as land barons (Ocheje, 2007).

The fact that most of the land available in African countries is largely owned by absent foreign owners from Western countries who assumed land rights during the colonial era, further limits the expanse of land at the disposal of African governments for purposes of property development by indigenes, especially in urban areas (Palmer, 1977; Phimister, 1988; Chitiyo, 2000; Moyo, 2001a; Moyo, 2003; Presidential Land Review Committee Report, 2003; Zoomers,

2010). In some cases, land rights have been acquired by absent foreign owners to an extent that all the land in selected geographical areas or jurisdictions in Africa is owned by one natural or juristic person (Land, Environment and Development 2005). For example, in Namibia, white people who constitute an estimated 7% of Namibia's total population of 2.5 million people own 70% of the land in the country (Jauch, Edwards and Cupido, 2011). 93% of the Namibian indigenes have to share the remaining 30% of the land. It is not surprising therefore that the land issue in Namibia has become highly sensitive in a country which has one of the highest inequality ratios in the world characterised by a lethargic land reform programme.

As was the case in the American South or Dixie, colonialists in Africa forcibly took land for self-aggrandisement and cared little for the best interests of African indigenes (Van den Brink *et al*, 2007; Almaguer, 2009; Mickey, 2015). The heirs and/or successors in title of the colonialists have since inherited land meant to benefit African indigenes and now exercise a significantly conscious stewardship over it. Like demigods, they claim to have more entitlements to the land compared to the dispossessed indigenes, in the process disregarding the dictates of God not to “rob the poor or covet thy neighbour's property” (Warikandwa and Asheela, 2017; Nhemachena and Warikandwa, 2017). Ownership of vast tracts of land by foreign landowners in Africa, as is the case in the American South or Dixie, is not about mere entitlement but signifies a way of living or social order (Bond and Masimba, 2002; Mamdani, 1996; Commander and Killick, 1998). Such way of living symbolises opulence, as well as dominance and/or superiority (racially, intellectually and economically) over the African indigenes (Mickey, 2015). The way of living or social order in the contemporary world is understood to refer to the New World Order. The New World Order is a socio-economic order in which a few white supremacist bourgeoisies, their black cronies as well as an emerging class of well-connected black elites, enjoy privileges which the majority of dispossessed as well as impoverished African indigenes cannot afford (Nhemachena and Warikandwa, 2017; Warikandwa and Nhemachena, 2017; Warikandwa and Asheela, 2017). Like supreme

beings from the sun, the white supremacist bourgeoisies and their cronies regard themselves as “illuminated”, “initiated” and/or “esoteric” and therefore better placed to exercise land entitlements as compared to their “inferior” and supposedly “incompetent” as well as “uninitiated” African indigenes. African indigenes can therefore not be bearers of entitlements (Warikandwa and Asheela, 2017) as they are merely “cattle” which must serve their “illumed” or “initiated” white masters.

Often, the prime commercial land registered in the names of absent foreign owners is used for lucrative business ventures (Hall, 2011) which includes but is not limited to real estate, game farming and large scale or commercial agricultural activities. Where no business activities take place, the vast tracts of prime peri-urban and urban commercial land remain largely unused or underutilised (Galaty, 2014). The land value increases at obscene rates overtime which makes it near impossible for previously disadvantaged indigenes to privately purchase the land for property development. Equally, the land in question is so costly so much that African governments cannot even invoke the process of expropriation through the use of the evidently “ineffective” willing buyer willing seller mechanism, to realise land reform. As such, African indigenes find it difficult to realise the right to housing because of a combination of the following factors: 1) a reluctance by African governments to formulate land use policies which frustrate white monopoly capital (white monopoly capital is largely regarded as the alpha and omega of Africa’s hopes to industrialise by most African leaders, economists and academics); 2) pro-capitalist property regulatory frameworks which favour a neo-liberal agenda and subsequently exacerbate colonial injustices in Africa; 3) Western foreign ownership and control of vast tracts of prime commercial land with such owners not prepared to part with their land for developmental purposes; and 4) the emergence of corrupt land barons (working in cahoots with equally corrupt government officials and politicians) who fraudulently dupe desperate home seekers to part with their hard earned cash in the belief that they are legitimately purchasing land for property development. This category of well-connected African elitists elects to fatten their pockets in a similar

fashion to colonialists and care less for the plight of the desperate and unsuspecting previously disadvantaged indigenous home seekers.

As already pointed out, attempts to rely on expropriation clauses to get the land needed for indigenous Africans' quest to realise the right to housing and general land ownership have often not been fundamentally fruitful. The Western foreign owners are not willing to part with their land which they sacrilegiously hold on to (*Günther Kessl v Ministry of Lands and Resettlement and 2 others* Case No. 27/2006 and 266/2006; Glinz, 2009). Even if the foreign owners were willing to sale their property at market value, African governments would not have the money to compensate the owners. The only practical approach to redistribute land would be to adopt a militarised approach resulting in land seizures as has been the case in Zimbabwe (Mujere and Dombo, 2011). Further, the emergence of a class of increasingly corrupt government officials who would do anything for money, including frustrating any legitimate processes aimed at ensuring affordable and adequate housing to the previously disadvantaged indigenes has frustrated the process of land allocation to dispossessed as well as previously disadvantaged home seekers. As such, countries such as Zimbabwe (Nemukuyu, 2016), Malawi (Nyasa Times, 2013) and South Africa have seen many legitimate home seekers being duped by corrupt government officials into building on land that is "illegally" acquired. Once houses are built on "illegally" acquired land, the supposedly people representative African governments orchestrate housing demolition exercises which leave many previously disadvantaged African indigenes homeless and landless. African governments and administrative officials are perpetrating structural and/or economic violence on their own people in a manner that is akin to or far exceeds the levels employed by the "deposed" colonial regimes (Olivier de Sardan, 1999; Blundo and Olivier de Sardan, 2006). South-Africa is a prime example of such developments.

It is therefore not surprising that in post-independence South Africa, the right of ownership is not absolute, but is subject to Constitutional, private-law and public law limitations. However, before such limitations may be imposed, it must be established

whether or not they are justifiable at law. Section 26(3) of the South African Constitution provides that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances”. Nowhere is this legal prescription more important than in the Lenasia housing case in which residents faced eviction without compensation for purchasing and building on land sold by corrupt provincial government officials and their agents. The State not only demolished the houses but also indicated that it was not prepared to consider the possibility of continued occupation by the affected citizens. This chapter seeks to interrogate the legality of demolishing Lenasia residents’ houses and establish the extent to which the English doctrine of “clean hands”, the emerging jurisprudence of public procurement regarding irregular tender awards and recent Constitutional Court rulings provide guidance on the issues implicated.

Property rights are central to the process of indigenisation and empowerment of previously disadvantaged, impoverished as well as dispossessed African indigenes (Thonje, 2013; Wilson, III 1990; Thouvenot, 2013). However, it has emerged in law and in practice that the process of advancing property rights in South Africa, particularly those pertaining to housing, is fraught with major challenges (For an outline of some of the challenges related to property rights in South Africa, in particular the right to housing see the Presentation to the Portfolio Committee on Human Settlements, Parliament of South Africa, of 25 July 2013 on the Newtown urban village evictions (See also “News24News 4 June 2014, and News24News 11 June 2014). Key developments in South Africa illustrate how desperate home seekers, who are perennially on housing waiting lists, end up being victims of corrupt government officials who dupe them into parting with their hard earned cash without any recourse to the law after the residential properties they developed are destroyed by the government for being “illegally” built (Van der Walt, 2005). The analysis of the deprivation of property rights in South Africa must be pursued in the context that property law during the apartheid era was tailor-made to systemically and consistently disregard indigenes’ legitimate quest to realise property

rights. As such, the introduction of an entrenched Bill of Rights in the 1996 Constitution of South Africa and a property clause, section 25, should signify a transformative effect on the property law regime of South Africa.

In the 2013 Lenasia housing saga, eighty houses were demolished in Lenasia (ENCA, 2014; Ntshidi, 2012) and it is feared that hundreds more residents in South Africa could face similar demolitions in future, a practice which clearly has a limiting effect on the property rights of the affected citizens. It is therefore plausible to examine the legal and humanitarian implications of the Gauteng Provincial Government's stance in destroying houses built by desperate home seekers without providing them with alternative housing options contrary to constitutional objectives regarding property ownership. Further, it must be determined whether or not it is permissible for the Gauteng Provincial Government to insist on taking back land "illegally" sold by corrupt officials when doing so may not serve the best interests of the public and is likely to condemn the "bona fide" home seekers to homelessness. To address these issues, this chapter undertakes an analysis of the constitutionality of limitations to property ownership in South Africa. Lessons will be drawn from English law and recent South African public procurement jurisprudence in which the courts have shown palpable reluctance to overturn illegal tender awards where the practical and cost implications to the state and citizens appear to be excessive and/or unavoidable.

Background to the Lenasia Housing Demolition Saga

The right to adequate housing is intrinsically linked to various other cross-cutting human rights (South African Human Rights Commission Presentation to the Portfolio Committee on Human Settlements of 20 February 2013: 5). In particular, public participation, access to information, and the right to just administrative action are central to ensuring access to the right to housing. This right is recognised in section 26 of the Constitution of the Republic of South Africa and in many international human rights instruments, especially the Universal Declaration of Human Rights

(See Article 25 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948). These instruments place an obligation on the South African government to ensure the continuous improvement of its citizens' living conditions. However, the Lenasia housing demolition saga has raised questions about the South African government's sincerity and commitment to ensuring that everyone in the country accesses the right to housing. The saga arose out of the Gauteng Provincial Government's demolition of both occupied and unoccupied partially built houses in Lenasia, Johannesburg, on the 4th of November 2012 (Cox, 2012). The houses had been built by 164 purportedly "illegal" occupants who had bought stands from corrupt former and current City of Johannesburg officials (Ibid). The officials defrauded the occupants by selling them State-owned land for about R50 000 a stand (Ngobeni, 2013). Most of the corrupt City of Johannesburg officials have since been convicted of defrauding the occupants, a development which suggests that the occupants bought the stands in good faith and were innocent victims of unscrupulous government officials. The Gauteng Provincial Department of Housing used a court order as its legal basis for undertaking the demolitions (Cox, 2012). In justifying the demolition of the houses, the Department argued that the purported "illegal" occupants had been afforded an opportunity to engage with it with a view to being put on the housing waiting list, but only eleven of the occupants responded. Armed with this misconstrued perception of belligerence on the part of the occupants, the department embarked on the demolitions which were only stopped following the conclusion of an agreement to reach an out-of-court settlement between the Provincial Government and the South African Human Rights Commission (SAHRC) representing the occupants (Ndlovu, 2012).

In a presentation to the Portfolio Committee on Human Settlements after the demolitions, the SAHRC pointed out that the Lenasia demolitions reinforced a need to further engage with government officials on lawful eviction procedures and orders (See the Presentation to the Portfolio Committee on Human Settlements, Parliament of the Republic of South Africa, 20 February 2013: 17). The SAHRC sought a stay of further evictions of purported "illegal"

occupiers in Lenasia whose houses were yet to be demolished. In the said presentation, the SAHRC made recommendations to the Gauteng Department of Housing through the Lenasia Intervention Plan framework document (The Lenasia Intervention Plan is an equity and compliance based framework document aimed at addressing the housing saga in Lenasia. It was presented by the SAHRC on the 28th of November 2012 and is available at www.sahrc.org.za/home/index.php?ipkArticleID=162 (accessed 9 June 2017)). The recommendations focused on a need to establish a rights-based response by the Department on issues of “...communication and information sharing, meaningful engagement and consultation, correct procedure on evictions and relocation...issuing of notices and anti-fraud corruption measures” (See the Presentation to the Portfolio Committee on Human Settlements 2013: 17). The SAHRC considered the Lenasia demolitions as amounting to a mockery of and direct affront to human rights (Cox, 2012). These conclusions of the SAHRC lead appropriately into the immediately following discussion as to whether or not there was any constitutional basis for the demolitions.

Limitations to Property Rights in South Africa

The right to property ownership in South Africa is not absolute. It is subject to constitutional limitations (See sections 25 and 26 of the 1996 Constitution of the Republic of South Africa (herein after referred to as the Constitution)), private-law limitations such as neighbour law (Neighbour law regulates the way in which conflicts between neighbours are resolved. Each owner is entitled to the use and enjoyment of his property, exercised in a reasonable manner, to avoid unreasonable infringement of the neighbour’s similar entitlement. See the following cases for a detailed evaluation of the concept of neighbour law and its application at law: *Laskey v Showzone CC* 2007 (2) SA 48 (C); *Allaclas Investments (Pty) Ltd v Milnerton Golf Club* 2008 (3) SA 134 (SCA); *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A); *Kirsh v Pincus* 1927 TPD 199; *Dorland v Smits* 2002 (5) 374 (C); *Trustees of the Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) and *Lombard v*

Fischer (2003) 1 All SA 698 (O)), and public-law limitations such as planning (Planning law restrictions on ownership are imposed through legislation and subordinate legislation [regulations], and therefore constitute public-law restrictions on ownership. Planning law restrictions are regulated through legislation such as the Development Facilitation Act 67 of 1995, Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, Extension of Security of Tenure Act 62 of 1997 and the Subdivision of Agricultural Land Act 70 of 1970. Court decisions such as the *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1994 (3) SA 336 (A); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC); and *Boiler Efficiency Services CC v Coalcor (Cape) (Pty) Ltd* 1989 (2) SA 460 (C) have also provided for the existence of zoning requirements), and environmental law (Limitations with regards to environmental issues can be effected through environmental legislation which protects the natural environment and restricts the establishment of townships. Such legislation includes the National Environmental Management Act 107 of 1998). The 1996 Constitution of the Republic of South Africa provides that “no one may be arbitrarily deprived of property” (See section 25(1) of the Constitution). Further, it provides that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances” (Section 26(3) of the Constitution). The constitutional provisions offer the legal basis upon which a critical assessment of the Lenasia housing demolitions may be undertaken. Such an analysis of those provisions and their limitations should provide authoritative guidance as to the scope of property ownership and related rights in South Africa.

The Constitution's Property Clauses and Related Limitations to Property Rights

The Bill of Rights in the Constitution operates both vertically and horizontally in appropriate circumstances (See Chapter Two of the South African Constitution (See also Nolan, 2014: 61). Section 25 of the Constitution usually applies in respect of a citizen's relationship

with the State (vertical applicability) and section 26(3) often applies in respect of relations between private citizens in the context of evictions (Mostert *et al*, 2011; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC); Roux, 2008: 7). However, the State is empowered to deprive persons of property in terms of a law of general application (See section 25(1) of the Constitution) and to expropriate property in appropriate instances (See section 25(2) of the Constitution). In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner for the South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (2002 (4) SA 768 (CC) (hereinafter the *FNB case*)), the Constitutional Court held that:

Section 25 foresees a broad range of limitations on property rights generally designated as deprivations. Expropriation is the most severe form of deprivation of property, and is treated as a special subcategory that requires the payment of compensation. Thus, all deprivations (including expropriations) must be imposed in terms of a law of general application, not be arbitrary...and...must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom..." (*FNB case* para 58-59).

Based on the ruling in the *FNB case*, property rights may be limited in terms of the general limitations clause of the Constitution (See section 36 of the Constitution). Accordingly, section 25 rights may be limited in terms of section 36 of the Constitution, which provides that fundamental rights may be limited insofar as this is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Thus, property rights may be curtailed in appropriate instances in furtherance of other reasonable and constitutionally justifiable social projects. At this point it must be enquired whether there was any reasonable basis for regarding the State's demolition of the Lenasia houses as a justifiable course of action falling within the scope of permissible general limitations to the homeowners' property rights.

The answer to the question may be addressed by establishing whether or not the demolition of the Lenasia houses amounted to a deprivation or expropriation in the public interest. Deprivation and expropriation are concepts which are fundamentally distinct. To “Deprive” as used in section 25 refers to the State’s “police power” (its ability to regulate the use of private property by restricting the owners’ entitlements) (Van der Walt, 2006: 310). On the other hand, expropriation refers to the State’s ability to take private property without the consent of the owner, for a public purpose or in the public interest, against payment of compensation (*Ibid* 313). Expropriation amounts to a complete withdrawal of an owner’s entitlements in respect of his property. In practice, it can sometimes be difficult to distinguish between the two concepts. Considering these two legal approaches to property rights limitation by the State, it is plausible to contend that the destruction of the Lenasia houses amounted to a deprivation.

However, it must also be considered that for a definitive conclusion of deprivation to be established, the property rights must have been acquired legally (See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 18. It is imperative to note that it would be to no avail if property could not be used and enjoyed if rights of acquisition, enjoyment and disposal are not legally protected. Such a situation ensues if property rights have been illegally or irregularly acquired). In the Lenasia case, it is highly contentious to regard the property rights illegitimate. The South African Government, as represented by the Gauteng Provincial Government, argued that the residents acquired the stands in an irregular manner and had been advised to stop developing the stands subject to the regularising of the legality of their ownership. On the contrary, and on humanitarian grounds, questions must be raised as to the legal status or quality of the bona fide acquisition of the stands by unsuspecting home seekers from corrupt Gauteng Provincial Government officials. These citizens genuinely believed that they had acquired the stands legally. The critical question therefore is whether or not it was legally permissible to demolish the houses of bona fide home seekers on the grounds that they were built on State land sold to them illegally by corrupt Gauteng Provincial Government

officials. Examination of a famous English legal maxim of equity could offer guidance as to whether or not the Lenasia residents who had their properties destroyed have any credible legal basis on which to contest the legality of the State's demolition of their properties.

“He Who Comes to Equity Must Come with Clean Hands”

The maxim “He who comes to equity must come with clean hands” operates in English law to prevent any affirmative recovery for a litigant with “unclean hands” (See *Everet v Williams* Ex. 1725 9 L.Q. Rev. 197. The main finding in this case was that equity will always decline relief in cases in which both parties have schemed to circumvent the law. See also *Johnson v Yellow Cab Transit Co.* 321 US 383, 387 (1944); Dobbs, 1993: 68; Herstein, 2011). It is the basis and/or purpose of the clean hands doctrine to protect the integrity of the courts. However, it must be understood that the doctrine does not seek to disapprove of illegal acts but will deny relief for improper or unconscionable conduct that, as a matter of policy, ought to be discouraged (McGhee, 2004: 96). In the Lenasia case, the residents whose houses were demolished were desperate home seekers who were improperly allocated residential stands on State-owned land by corrupt Provincial Government officials. These residents were professedly acting in good faith. If it is deemed correct that the residents were acting in good faith then in terms of the “clean hands doctrine” they would not be punished. In essence the rule is not meant to punish carelessness or a mistake (McGhee, 2004: 96. See also *Carpenter v Calico Quays Ltd* [2011] EWHC 96 (Ch), [2011] All ER (D) 212 (Jan)). It looks to the intent or substance rather than the form of the mistake (Halliwell, 1994). See also *Barrett v Barrett* [2008] EWHC 1061 (Ch) [2008] 2 P & CR 17) and demands that he who seeks equity must do equity (*Lodge v National Union Investment Company Limited* (1907) 1 Ca.300. a310).

Herstein has observed that, “Given its natural-law ‘feel’ and its humanitarian tenor, it is surprising that the clean hands defence has attracted so little jurisprudential reflection” (*Ibid*). Herstein’s view is especially significant when applied to the Lenasia housing case. The doctrine of equity is a doctrine of equality. If one party argues that

another party has violated the law and therefore waives his/her legal standing, it is plausible to contend that the hands of the party so alleging must also have no blemish. The law does not deny access to established recourse to a victim of legally recognised wrongdoing even if the victim's past is marred with legal or ethical blemishes (Ibid). If the Gauteng Provincial Government officials regarded the residents as having obtained the residential stands in an irregular manner, they should also have realised that the residents still have recourse to the law and that their officials were party to the irregular practices that gave rise to the Lenasia saga. This reasoning leads to a norm rarely alluded to when addressing the clean hands doctrine. It is the *tu quoque* (you too) norm (Ibid). This norm captures the widely held conviction that those guilty of wrongdoing are in no position to condemn, judge, criticise, blame, or make claims on others for performing similar or related wrongs (See Laycock, 2002: 966. See also *Beelman v Beelman* 121 I11. App. 3d 684, 688 (I11. App. Ct. 5th Dist 1984) and *Mascenic v Anderson* 53 I11. App. 3d 971, 972 (I11. App. Ct. 1st Dist. 1977)).

The reasoning applied in the *tu quoque* norm can be arguably regarded as sharing the same logic and structure as the clean hands doctrine. It must be emphasised that the doctrine of unclean hands functionally rather than moralistically conceived, gives recognition to the fact that equitable decrees may have effects on third parties. Such third parties include members of the law-abiding public who would also want justice to be seen to be done. In this regard the doctrine of clean hands must not be seen to be applied to members of the public yet excluding government officials (See *Byron v Clay* 867 F.2d 1049, 1051 (7th Cir. 1989). If this reasoning is cogent and compelling, then it is plausible to argue that the Gauteng Provincial Government had no right to demolish the purportedly “illegally” erected structures or houses if it is proven that its officials were party to the irregular transactions leading up to the “illegal” acquisition of the stands. The courts have previously put a distinction between a “bribery agreement” (hypothetically between the corrupt officials and the residents) in terms of which a bribe is effected and the “follow-up agreement” [the sale of stands by the council (represented by the corrupt officials) to the residents]. While the former is void, the latter

is voidable. As such, a simplistic approach should not have been adopted with regards to the Lenasia housing case (See *Plaaslike Boeredientse (Edms) v Chemfos Bpk* 1986 (1) SA 819 (A); *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA); and Williams & Quinot, 2007: 358). For purposes of punitive State response, the irregular conduct of the Gauteng Provincial Government officials and the alleged wrongful conduct of the residents whose houses were demolished ought to be treated equally. If it is concluded that the principle implicit in the doctrine of clean hands was not followed correctly by the Gauteng Provincial Government, it must then be determined as to how best the Lenasia housing saga should have been dealt with. In this respect lessons can be drawn from South Africa's public procurement jurisprudence on how best to address incidents of the irregular attainment of rights, benefits and/or privileges in a democratic society founded on a supreme constitution. That discussion follows below.

Lessons from the Outcomes of Judicial Reviews of Public Procurement Decisions Tainted by Irregularities

The cautious judicial approach adopted by judges in South Africa with regards to irregular tender awards is both significant and instructive in examining the attitude adopted by the Constitutional Court in addressing matters relating to “illegally” acquired property. It will be established in this section that South Africa's public law jurisprudence now shows that where an order setting aside an “illegally” obtained tender is likely to generate negative consequences for the public interest, then such consequences must be carefully weighed up in deciding whether or not to terminate the tender award (See *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA). See also *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA)). Special emphasis in the analysis of the public procurement case law is placed on scenarios where the matter had reached the contract performance stage by the time judicial review was sought by the unsuccessful contractor.

Lessons from public procurement jurisprudence

According to the pertinent case law, due consideration is to be accorded to the loss of business opportunity by the successful contractor and the legal costs which are likely to ensue from the process of undoing the contract in the event that the contractor is forced to terminate its performance due to the invalidation of the tainted tender award. Similarly the interests of those most closely associated with the benefits of that contract must be given due weight (*AllPay Consolidated Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 56 and 78. In this case, the reasoning of the court was that a finding of the invalidity of a tender awarded unlawfully must take into consideration the need to protect the general interests of all parties with a direct or indirect pecuniary interest in the tender and its invalidation). That exercise must be sensitive to the need to ensure public administration compelled by constitutional precepts and at a broader level entrenching the rule of law (*Steenkamp No v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) para 29). Where there is a failure to adhere to the said precepts, the requirement and appropriateness of judicial compellability of correction and reversal of the invalid administration action leading to the illegal tender award is grounded in section 172(1)(b) of the Constitution (See *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) para 101. See also Van de Merwe *et al*, 2012: 176; Visser, 2008: 4 & 442; and Du Plessis, 2012: 113). In this context the consequences of invalidity must be corrected or reversed where they can no longer be prevented which is an approach that accords with the rule of law and the principle of legality (*Bengwenya Minerals (Pty) Ltd and Others v Genorab Resources (Pty) Ltd and Others* 2011 (3 BCLR 229 (CC) para 85). It is submitted that similar reasoning could be applied to the Lenasia residents' case in which demolition of the houses would lead to potential lawsuits from the homeowners and the builders who were contracted to build the houses. This is aside from the eventuality that the residents whose houses were destroyed faced the risk of homelessness. It is therefore understandable why the courts have in the public procurement

context been deliberately slow to set aside a tender award tainted by irregularities where such a sanction may produce unintended consequences that are prejudicial to the public interest.

In the case of *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd and Another* (Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA)), the Supreme Court of Appeal's ruling suggests that the judicial discretion to grant a "just and equitable order" in response to an "illegal" tender can only be properly exercised after a careful consideration of the following factors: 1) the degree of irregularity; 2) the presence or absence of fraud, dishonesty, wrongdoing or some blameworthy conduct on the part of the successful tenderer (*Millennium Waste Management* case para 26); 3) the nature of the contract (*Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (C)); 4) the interests of the two competing tenderers and those of the public/state (*Millennium Waste Management* case para 26); 5) the nature and intervening events that occurred between the time of the tender award and the judicial review; and 6) the practical legal consequences of invalidating the tender award. The reasoning of the courts in the public procurement cases may be applied to the Lenasia housing demolition saga to produce similar outcomes.

Application of the lessons from judicial review of public procurement decisions to the Lenasia housing saga

The Supreme Court of Appeal in the case of *Moseme* appeared to call for restraint in the exercise of underlying judicial discretion before a sanction is imposed in respect of an "illegal" tender award (*Moseme* case paras 15 and 21). The detail and tenor of the Supreme Court of Appeal decision in the *Moseme* case suggests some sort of judicial inclination to allow irregular tender awards to stand where the practical and financial costs of invalidating them are substantial (Osode, 2013: 13). It is imperative to stress that the application of the approach adopted with regards to irregular tenders in public procurement must be viewed in light of the fact that, "The State must respect, protect, promote, and fulfil the rights in the Bill of Rights" (See section 7(2) of the 1996 Constitution of the Republic of South

Africa). This formulation of the State's duty towards the rights elaborated in the Bill of Rights has significant implications for the realisation of international human rights and the constitutional (social and economic) rights, especially the rights of illegal land occupiers in an eviction dispute (See Liebenberg, 2003: 33. See also *Modderklip Boerder (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 (6) BCLR 638 (T) 680I para 44). Against that backdrop, it is submitted that the cautious judicial approach adopted in the public procurement cases in judicial reviews of irregular tenders should also be adopted by the State when dealing with previously disadvantaged home seekers. It is in the public interest that prospective home owners are assisted as far as is reasonably possible to acquire such property rights (See section 26 of the 1996 Constitution of the Republic of South Africa).

The reasoning of the Supreme Court of Appeal in the *Moseme* case appears to mirror the judicial approach adopted in the *FNB* case with regards to property rights. In the *FNB* case, the Constitutional Court held that one should frame the enquiry into the constitutionality of an infringement of a property right as follows: 1) Does the affected interest qualify as property under section 25? 2) Has a deprivation of that property interest occurred? 3) Is the deprivation in conflict with section 25(1), and especially the requirement of non-arbitrariness? 4) If the answer to the third question is "yes", is the deprivation nevertheless justifiable in terms of section 36? On the basis of the Constitutional Court's articulation of limitations to property rights and in view of the approach adopted in judicial reviews of public procurement awards, it must be determined whether it was legally permissible to demolish the Lenasia illegal occupiers' houses.

Section 26(3) of the 1996 Constitution of South Africa can be read to imply that alternative accommodation must be provided before a property right to ownership of a house can be limited, in this case through demolition. Two landmark Constitutional Court decisions can be relied upon to advance this argument founded on section 26(3) of the 1996 Constitution of South Africa. The first case is that of *Schubert Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another (Schubert Park Residents' Association*

and Others v City of Tshwane Metropolitan Municipality and Another 2013 (1) SA 323 (CC) (herein after *Schubert Park Residents* case)). In the *Schubert Park Residents* case Judge Johan Froneman held that the eviction of residents in the absence of alternative accommodation was not a lawful eviction (*Schubert Park Residents* case para 53). The second case is that of *Occupiers of Skuurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* (*Occupiers of Skuurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* 2012 (4) BCLR 382 (CC) (herein after *Occupiers of Skuurweplaas* case)). Here, Judge Yacoob held that it would be just and equitable if occupiers of land were required to move off the land a month after the municipal authorities were ordered to make alternative accommodation available for use by the occupiers.

From the Constitutional Court rulings, it is clear that a court ought not to grant an order that will lead to homelessness. Accordingly, before an order is granted, it must be established whether there are special circumstances such as: 1) Risk of homelessness; and 2) The failure of the Gauteng Provincial Government to prevent the corrupt sale of land by its own employees. It is evident that the demolition of the Lenasia houses fell short of the requirement to consider the public interest measured in terms of enforcing the right to housing and reversing the legacies of the apartheid era. The demolition of the Lenasia “illegal” occupiers’ houses by the Gauteng Provincial Government also failed to give appropriate attention to the risk of homelessness. Even if the English doctrine of equity were to be applied, the Constitutional Court decisions in the *Schubert Park Residents* case and the *Occupiers of Skuurweplaas* case emphasised the importance of providing alternative accommodation. There is also no evidence that the residents acted in bad faith. If anything, there is evidence which suggests dishonesty on the part of Gauteng Provincial Government officials regarding the manner in which they sold the stands in Lenasia to the desperate home seekers.

If the government has an obligation to meet basic housing requirements as enshrined in the Constitution then it must adopt a reasonable programme to provide for citizens in urgent need of housing especially those living in intolerable conditions (*Government of*

the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)). It must also meaningfully engage with potential evictees to ascertain if they will be rendered homeless by an eviction and determine what alternative accommodation can be provided under the circumstances (See *Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v the City of Johannesburg and Others* 2008 (3) SA 208 (CC)). In this case, the Constitutional Court held that the meaningful engagement must be performed prior to decision-making on the commencement of the eviction proceedings. See also *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC). In this case, the Constitutional Court held that if engagement takes place after there has been a decision to institute eviction proceedings, it cannot be considered as genuine or meaningful and proper engagement unless it includes taking into consideration the needs of those who will be affected). In terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (See section 4(6), (7) and (8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998), no evictions should occur until the results of the proper engagement process are known. It is not therefore surprising that the courts are very reluctant to order an eviction if it will result in homelessness (In addition to the two recent cases of *Schubert Park Residents* and *Skuverplaas*, a wealth of jurisprudence regarding the courts' reluctance to order evictions where there is a reasonable threat of homelessness exist. For example, see the following cases: *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others*, 2011 (7) BCLR 723 (CC); *City of Johannesburg Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2011 (4) SA 337 (SCA); *City of Johannesburg v Changing Tides 74 (Pty) Ltd and 97 Others (Socio-Economic Rights Institute of South Africa intervening as amicus curiae)* (735/2011) [2012] ZASCA (14 September 2012); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA); *ABSA Bank Ltd v Murray & another* 2004 (2) SA 15 (C); *Baartman & Others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA), *Occupiers of 51 Olivia Road, Bera Township and 197 Main Street, Johannesburg v City of Johannesburg & Others* 2008 (3) SA 208 (CC);

City of Johannesburg v Rand Properties (Pty) Ltd & Others 2007 (6) SA 417 (SCA); *Ndlovu v Ngcobo: Bekker & another v Jika* 2003(1) SA 113 (SCA); *Wormald NO & Others v Kambule* 2006 (3) SA 562 (SCA); *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & Others* [2009] 4 All SA 410 (SCA); and *Occupiers of Mooiplaats v Golden Thread Ltd & Others* 2012 (2) SA 337 (CC)).

A Critical Analysis of the Weaknesses of the Contemporary South African Property Law Regime

The assessment of the Lenasia housing demolition saga done in this chapter points to the weakness of the current property laws in South Africa in so far as closing the gap between the previously disadvantaged and advantaged persons is concerned. The weaknesses of the property law regime in South Africa are similar to the legal regimes existing in other parts of Africa such as Namibia, Zimbabwe, Zambia, amongst others. The weaknesses relating to the formulation of property laws are primarily attributed to a capitalist inclined and prejudicial theoretical framework underpinned by neo-liberal and liberal socio-economic philosophical constructions (Van der Walt 2009). The prejudicial theoretical framework disregards the best interests of previously disadvantaged home seekers such as those in the Lenasia case and promotes property rules and principles which are underlined by colonialist concepts of individualism and exclusionary ideological constructions and objectives. In principle, the property rules and principles seek to relegate previously disadvantaged home seekers to perennial tenants who cannot exercise entitlements over property and must continually pay rentals to colonialist capitalists and their greedy African cronies occupying influential government positions. The exclusionary ideological construction to implementing property rules and principles has negatively impacted on the development of an inclusive Constitutional Law driven property law regime in the post-independence era (Van der Walt, 2009). As is evidenced in the Lenasia demolition case, a pro-apartheid approach was relied upon by the Gauteng Provincial Government to demolish the supposedly

illegally acquired residential stands. Little regard was placed on the historical context of the victims of the demolitions; some of whom would have spent their meagre earnings to put up structures which they had hoped would serve as their retirement homes. That it took a black Government run Provincial Government to rely upon an apartheid government approach to justify property demolitions of previously disadvantaged black South Africans raises more questions than answers. In the main, it must be questioned as to who the black Provincial Government serves. This question is important because South Africa operates in a post-apartheid era which is constitutionally driven yet it is characterised by a property law regime that is heavily influenced by the apartheid property law regime (Van der Walt, 2009). The Lenasia houses demolition case signifies that the current property law regime is not conducive to realising the right to housing for previously disadvantaged South African indigenes. As such, the so-called constitutional driven transformation agenda remains a white elephant in the room as evictions and property demolitions are made easier through placing emphasis on owner autonomy as opposed to public interest. It is in this regard that Van der Walt vigorously proposes for a need to usher in a new property law regime aimed at attaining a balance between owner autonomy or exclusivism and public interest aimed at transformation (Van der Walt, 2009). The property law regime must be underpinned by constitutional property objectives and should focus on socio-legal transformation, equity and justice as well as equal access to property and natural resources (Van der Walt, 2009).

The Lenasia houses demolition case is evidence that South African property law is greatly informed by capitalist ideological constructions which favour exclusivity and individual autonomy over Ubuntu driven values which prioritise community interest or public interest (*Ibid*). This property law regime is implemented by the South African government and the courts with little or no regard to the prejudices suffered by the Lenasia housing demolition victims. In essence, the property law regime ignores the transformation objectives outlined in the South African constitution.

Recommendations

The demolition of the Lenasia houses is a regrettable development in South Africa's constitutional era. It is sad that a black Provincial Government adopted an apartheid approach to addressing the perceived illegal occupation of land in Lenasia. Surprisingly, the interests of the impoverished Lenasia residents were not taken into due consideration. The historical context of the Lenasia residents was simply ignored in favour of the Provincial Government's superficial interests. If a purposive approach to applying property law was adopted, social factors and political policy directions would have indicated that the houses should not have been destroyed. In that regard, it is proposed that future cases mirroring the Lenasia housing demolition saga must be decided on the basis of a purpose-oriented approach which recognises the historical context of the victims of proposed demolitions. A purposive approach provides a balance between the black letter of the law and the social context in which the law has to be applied. As such, the object and scope of the constitution regarding transformation and the circumstances of the allegedly illegal land occupants must be balanced. If it would be in the best interest of the public for the allegedly illegal occupants to occupy the land, they should be left to occupy the same if so doing would realise transformation objectives. Necessary measures would then be taken by the Gauteng Provincial Government to compensate the "aggrieved land owner" which in this case was the State. The interests of previously disadvantaged South Africans cannot be compromised over a need to adopt a literal interpretation of property laws. The Gauteng Provincial Government must have complied with the national government's transformation objectives as spelt out in the constitution. A literal approach to interpreting property law must not be embraced if to do so would lead to an absurdity. The case of *Jaga v Donges* (*Jaga v Donges* 1950 (4) 653 (A)) provided useful guidelines for interpreting statutes. In this case, Schreiner JA in his famous minority judgement pointed out that:

“1) Right from the outset, the interpreter may take the wider context of a provision (for example its ambit and purpose) into consideration with the legislative text in question;

2) Irrespective of how clear or unambiguous the grammatical meaning of the legislative text may seem to be, the relevant contextual factors (for example the practical effects of different interpretations, as well as the background of the provision) must be taken into account;

3) Sometimes the wider context may even be more important than the legislative text;

4) Once the meaning of the text and context (language-in-context) is determined, it must be applied, irrespective of whether the interpreter is of the opinion that the legislature intended something else.” (Botha 2005: 51)

It would therefore have been plausible for the Gauteng Provincial Government not to demolish the Lenasia houses in the face of an alleged unlawful occupation of land if a wider interpretation of the circumstances prevailing had been done. The victims of the demolitions had waited several years to get stands and were duped into buying stands illegally by corrupt government officials. The Gauteng Provincial Government’s hands were dirty hence an objective resolution to avoid the demolitions would have been plausible under the circumstances.

Conclusion

The conduct of the Gauteng Provincial Government in the Lenasia case fails the test enunciated in the two Constitutional Court judgments (See *Schubart Park Residents* case para 53. See also *Occupiers of Skurweplaas* para 14. See also Lawyers for Human Rights 2011; and Socio-economic Rights Institute of South Africa 2008). It also falls short of the test set out in section 4 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (Section 4(a) in particular prevents the occupation of property subject to an unlawful exchange of money for such property. The Lenasia case has not proven that the occupants were entirely at fault for occupying the State’s property. It is evident that the corrupt officials misled the

desperate home seekers into believing that they were lawfully acquiring the stands. See also Walters 2013:22 & 146. See also *Arendse v Arendse & Others* 2013 (3) SA 347 (WCC)) and of the requirement prescribed by section 26(3) of the Constitution (Section 26(3) of the South African Constitution provides everyone the right of access to adequate housing. This provision must be seen as a fundamental right intended to birth a decisive break with the apartheid past in which black people were subjected to summary forced evictions. This provision must therefore be the basis upon which wholesale transformation of evictions-related processes must be premised (See also Bilchitz, 2003; Campbell & Anaya, 2008: 377; Chenwi, 2008: 105; and Chenwi & Liebenberg, 2008: 12).

Furthermore, the said conduct runs afoul of the requirements for determining the appropriate remedial response to irregular conduct in the public procurement context and relied upon in this chapter as an example of best practice in addressing illegal conduct. In the Lenasia case, the Gauteng Provincial Government argued that the illegal land occupiers had acted in bad faith by continuing to build the houses despite their undertaking to cease construction work. Although the Gauteng Provincial Government acted within its “rights”, the demolitions not only fail the test of constitutionality but also that of morality. This submission is founded on the “cleans hands” doctrine of English law which requires that all parties who seek equity must come with clean hands. The conduct of the Gauteng Provincial Government’s officials left the government with “unclean hands” which automatically disentitled it from taking legally defensible reprisal action against the illegal occupiers. Furthermore, the Constitution prohibits any conduct by government which leaves land occupiers homeless. Sadly the government in post-apartheid South Africa has often sought to evict citizens to whom it has failed to allocate land.

The Lenasia housing demolition saga best illustrates the need for the government to institute measures to proactively protect state property from illegal occupation in order to avoid the recurrence of unfortunate incidents such as those which occurred in Lenasia. It is essential to ensure transformative justice by observing the clear distinction between governmental practices of the apartheid era and

those of the current constitutional property dispensation (Daly, 2001: 74; Evans, 2013; Mani, 2008: 253; and Duthie, 2008: 292). South Africa's solid constitutional foundation can ensure that the government progressively addresses imbalances in property ownership. Given that the government is the lead proponent and driver of black economic empowerment, its approach in the Lenasia housing demolition episode raises legitimate questions regarding the sincerity of the State's intent to advance individual property rights.

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Human Rights to Land or Land Rights? Charting a New Roadmap to Land Ownership in Africa

Tapwa V. Warikandwa & Artwell Nhemachena

Introduction

Land and resource-related rights are of fundamental importance to African indigenes for a range of reasons, including: identity, socio-economic factors, self-determination, and land's religious significance. Land, in the pre-colonial, colonial and post-colonial times has been a key economic asset (Warikandwa & Asheela, 2017), with the holders or owners of the same realising economic ascendancy. So important is land that there are plausible views to the effect that it is not another mere factor of production or an economic good but it is the fundamental basis for subsistence, a precondition for individual freedom, national sovereignty and an instrument for realising power or creating dependency (Karodia & Soni, 2014). In fact, land is so important that it has been and continues to be a cause of conflict and war in Africa. At the centre of such war and conflict is the fact that land is central to African livelihoods yet the land tenure system is skewed in favour of commercial interests of multinational corporations and descendants of “former” colonists who forcibly and/or violently dispossessed African indigenes of their land (Karodia & Soni, 2014; Moyo, 2009). Land grabs by foreign investors, with the blessing of Western or Asian captured African governments have continued to threaten African countries' ability to realise development through sustainable economic growth and overall security in their borders.

The land issue is therefore complex as it cuts across the, socio-legal, socio-economic, spiritual and political facets of the African society (Huggins, 2010: 10). This chapter focuses on the legal aspects of land ownership with a view to ascertaining whether or not African

countries have taken the right decision to recognise land rights and not the human right to land. The majority of African indigenes depend on land and the accompanying natural resources to fulfil their subsistence needs. Small garden plots, forest products, fishing, grazing pastures for animals, hunting, minerals, a healthy environment, all form the household economy of African indigenes. As such, land is a fundamental and not ancillary right to Africans.

Whilst land rights can be recognised individually or collectively, the African indigenes' security and permanence of their control and use of the natural resources is more important than mere direct ownership of the land. African indigenes' quest for land ownership derives from the need to ensure their access to land resources, hence it is of specific significance to scrutinise how the different legal regimes recognise this aspect of indigenous ownership. Land in the African society is not only an asset with economic and financial value, but also a very important part of people's lives. It is in this regard that the issue of the human right to land becomes fundamental. The majority of African indigenes are landless owing to repressive apartheid and colonial land policies and laws. The apartheid and colonial property rights regimes have been adopted in the post-colonial era as part of the negotiated settlements under the guise of "reconciliation". Such property rights regimes mirror the colonial and apartheid land ownership regimes in which the majority of Africans did not and still do not own land yet a minority own vast tracts of land, beyond what they actually need. What is forgotten by many is that access to land allows one to enjoy a number of fundamental human rights such as access to housing, food, water, right to life and many other socio-economic rights. Denying African indigenes access to land also denies them the ability to enjoy fundamental human rights. It is thus the objective of this chapter to show that the land rights discourse is flawed as emphasis in Africa should be placed on the human right to land. Land rights are subjective and are a tool for former colonialists to continue exercising control over African resources. Should an inviolable human right to land be recognised in Africa, many indigenes will access fundamental human rights and Africa will realise its developmental goals.

Distortions brought by the Colonial Land Ownership Regime to the African Regime: The Collective versus the Individual Land Ownership Regimes

The distinction between land rights and the fundamental right to land is important in the contemporary era characterised by a massive drive towards socio-economic transformation in most African countries. It is important to contextualise how land should be perceived from an African perspective. From an African context, ownership of land was underlined by principles of Ubuntu. Ubuntu placed emphasis on the exploitation of natural resources in pursuit of a common good (Warikandwa & Asheela, 2017). Land was regarded as a fundamental component of life which was essential to life and not subjective. For this reason, in the customary system of land ownership, land would be accessible to all to ensure that each family and/or community have food, water, a clean environment, and good pastures for grazing. Land was also regarded as a source of mineral wealth necessary for realising sustainable economic growth (*Ibid*). Ubuntu focused on humanness and placed emphasis on the best interests of the collective and not the individual. Land was thus held by chiefs in the best interests of the collective and not the individual. The Department for International Development (DFID) (1992:2) quoted a British Privy Council decision of 1926 which stated that:

The true character of native title to land throughout the empire including South and West Africa: with local variations the principle is a uniform one. The notion of individual ownership is foreign to native ideas. Land belongs to the community not to the individual. The title of native community generally takes the form of a usufructuary right ... obviously such a usufructuary right, however difficult to get rid of by ordinary means of conveyancing *may be extinguished by the action of a paramount power which assumes possession of the entire control of land.*

From the above quotation, it is clear that land ownership, use and enjoyment were pursued in the best interests of the society and more significantly, for a common good. At no point would a chief be seen

to authorise forms of land ownership which compromise the best interests of society. Not even an economic debate would compromise the high community oriented value which was placed on land. A Yoruba chief, when asked who owned the land responded as follows, “That land belongs to a vast family of which many are dead, few are living, and countless numbers are yet unborn” (Karodia & Soni 2014: 296; DFID 1992: 2). The Yoruba chief’s response signifies the value which was placed on land by African communities. They understood that it was an important component of life which was inalienable. The Centre for Strategic and International Studies (2010:1) pointed out that the land tenure system of Africa has been characterised by people who have no formal documentation for their land ownership. Ownership of land in Africa has been informed by the number of years that people have lived on a piece of land as informed by their ancestors. Statutory regulation of land ownership was not known but customary regulation of the same.

Under the customary law system of land ownership, land ownership varied on the basis of a society’s political, social and cultural needs (Karodia & Soni, 2014: 297; World Bank, 2002; Quan, 2000, European Union, 2004). Individuals could acquire land rights through allocation by the chief (or his proxy the headman) or inheritance. Such individuals were known in that community and would always consult the headman or chief regarding such acquisition. As long as an individual continued to use the acquired land, such individual’s rights to use and enjoyment of the property were safeguarded by the community. The individual did not own the land but had the right to use and enjoyment of the same. The chief was not the owner either as he held the land in trust for the community. Under this system, the community contributed to the community food bank, as society was egalitarian and not individualistic.

Land in the African customary law system could also be held on a matrilineal relations basis. Under this system, the land used by a deceased person was taken over by a matrilineal relative (Karodia & Soni, 2014: 297). Due to subsistence farming, land control was also based on lineage. Land tenure was also based on State control. The King and his chiefs controlled land and assigned land rights to

subjects in their kingdom (Bruce & Knox, 2008). The customary law land tenure system worked for Africans as they were able to provide for their families and contribute to the community food banks. Seeds for various crops were not genetically modified and land was allowed to recover through rotation for it to remain productive.

However, the emergence of the paramount colonial powers supplanted the customary law regime and replaced it with the individualistic statutory land rights regime. The statutory colonial land tenure system was introduced by the colonial regime to legitimise their supplanting or theft of African indigenes' control over land and the accompanying natural resources (Warikandwa & Asheela, 2017; Aryeetey & Lewis, 2010). Through the statutory land tenure system, the colonial regime introduced uniform rules and regulations which were enforced by a central authority using a standard codified registration system (Karodia & Soni, 2014: 298). Unlike under the customary law system where ownership rights were collective, the colonial statutory regime ushered in a new system of vesting land ownership rights in individuals or a group of individuals (*Ibid*). Such individuals would then have their names inscribed on a title deed or property registry. As such, Western commercial farmers were granted individual freehold and leasehold tenure. The net effect of this approach was that Western commercial farming practices supplanted the customary agricultural regime practices leading to African subsistence farmers adopting technologies such as hybrid maize.

After attaining independence, the proliferation of Western agricultural activities compelled African indigenes who wanted to be commercial farmers to secure land tenure rights through the colonial statutory regime. The colonial statutory land tenure regime limited ownership of land by African indigenes and placed emphasis on their colonial interests. Sadly, contemporary African governments have continued to prioritise the Western statutory land tenure system with little regard being accorded to the customary land tenure system. The use of Western imported legislative blue prints has led to rent-seeking, corruption and land grabbing by Western companies (disguised as investors) working in collusion with greedy African elites (Karodia & Soni, 2014: 298; Warikandwa & Osode, 2017). The

land grabs have become pronounced due to the Western induced food insecurity in Africa aimed at creating a monopoly in global food production and supply. Companies such as Monsanto, an American publicly traded multinational agrochemical and agricultural biotechnology corporation have thrived as a result of the land grabs in Africa. Makanya (2004) has provided reasons why genetically modified (GM) seeds are not good for Africa. These include the following:

1. **GM crops contaminate non-GM crops:** African communities relied on non-GM crops for seeds. After each harvest, the farmers would keep the best crop harvested for use as seed in the next farming season. This is not possible under the GM crop regime as these crops contaminate indigenous seeds and render them incapable of being used as seed for the next farming season. This forces farmers to continuously buy seed from multinational companies such as Monsanto to the detriment of subsistence farmers whose farming costs suddenly escalate due to high input costs. GM crops thus promote dependence on corporate seed supply.

2. **GM crops have introduced the ‘A Terminator’ and ‘A Traitor’ technologies:** GM crops have introduced the ‘A Terminator’ seed technology which ensures that plants which grow from them produce sterile seeds which cannot germinate at any other time. Considering that 80% of subsistence farmers in Africa save their seed for the next farming season, the GM seeds significantly lower their productivity and explain the reason why there is fast growing food insecurity in contemporary African societies. Subsistence farmers often do not have money to buy the expensive GM seeds produced by the capitalist oriented multinational corporations. This emerging trend of food insecurity was rare under the African land tenure system. In fact, just after independence, in countries such as Zimbabwe, subsistence farmers contributed significantly to the national food bank a development which serves as reason why the country was once the leading food producer in the region. Seed sharing amongst neighbours is no longer practical as the

GM seeds do not germinate if obtained from the harvested crop. Further, the costs of farming have been rendered exorbitant by the introduction of 'A Traitor' technology which produces GM crops which need to be sprayed by chemicals in order for them to grow properly and produce a good yield.

3. GM crops have increased the use of chemicals in farming activities: An estimated 70% of GM crops currently being grown in the world have been genetically modified to resist certain herbicides which are meant to kill certain types of weeds. The herbicides are produced by the same multinational corporations which produce the GM seeds. With certain types of weeds now resisting the herbicides, new varieties of the same have to be introduced which means crops use more herbicides than ever before. The use of herbicides simply means more profits to the multinational corporations and more costs of farming for subsistence farmers.

4. GM crops are patented: Multinational corporations spiralling land grabs in Africa own almost 100% of agricultural biotechnology patents. These patents are controlled by a few pesticide corporations such as Monsanto. The patents are used to limit research that does not suit the business interests of the multinational corporations and to trap African governments and their poor farmers to pay royalties on a yearly basis and to promote an undying culture of dependence on chemicals produced by the same companies in order to realise descent crop yields.

5. GM crops suit an industrial agriculture system: The GM crops suit an industrial agriculture system for a number of reasons. Due to the land grabs by the multinational corporations, farming is taking place on large scale farms. This approach leads to the neglect of subsistence farmers who are estimated to constitute 80% of Africa's population. African governments should focus on empowering the small-scale farmers yet they are busy courting the multinational corporations in the guise of investment attraction. Such an approach undermines Africa's quest to realise its development objectives. Mono-cropping, subsidies, mechanisation and reliance on

external farming inputs are all negatives that have become associated with the “Big farmer” construction associated with the modern land grabs orchestrated by multinational corporations.

6. GM crops are threatening organic and sustainable farming in Africa: Natural fertility has been a key factor to African communities’ organic and/or sustainable agriculture system. Sadly, GM crops have been introduced with the effect of killing fungi and bacteria which are necessary to maintaining soil fertility management. The use of GM crops which produce toxin-producing genes has led to an increase in crop pests which renders natural insecticides ineffective. Without the laboratory generated chemicals to kill the pests, crop yields are significantly diminished. It is no wonder that African farmers have had to deal with a sudden increase in pests which are attacking their crops.

7. Biosafety systems required in agriculture in Africa are costly: African countries do not have the expertise, infrastructure, equipment, regulatory systems and legislation to implement effective biosafety measures for GM crops. The funds to put in place such mechanisms are not available as African governments are not generating much revenue owing to the fact that multinational corporations are externalising most of the proceeds from their immoral business practices. As such, for African countries to implement biosafety measures, they have to incur huge foreign debts through borrowing money from international lending institutions domiciled in Western countries from which the multinational corporations originate from. Thus GM crops could be regarded as instruments of a biological warfare against Africa by Western countries in the pursuit of economic gains.

8. GM crops will increase hunger in Africa: Africans will face starvation not because there is no food. Instead, the high costs of inputs made necessary by the GM companies will reduce crop yields from subsistence farmers. Such farmers will be rendered market incompetent because they will be competing against heavily

subsidised marketed agricultural products from the West or produced by the multinational corporations on the continent.

9. GM crops threaten human health and lead to the destruction of biodiversity: GM foods have been documented to cause a raft of diseases including cancer. Whilst the producers of GM crops dismiss this reality, Africans continue to be susceptible to all sorts of diseases in the 21st century a development which was rare when they were producing their own foods. Perhaps GM crops' production is a biological warfare against Africans aimed at realising human culling. The GM crops have also negatively impacted on the ecological balance a development which has brought serious repercussions for farming and the surrounding environment. The net effect is the same as the health of African people is significantly compromised. The agenda is clearly set and evident for the wise to see. As part of the New World Order agenda the world's population has to be significantly reduced in order to reduce pressure on the available natural resources (Hays, 2013).

In view of the above outlined issues, it is important that African governments critically analyse the neo-liberal land rights regime ushered into the continent by colonial imperialist forces. The colonial land rights regime was introduced to create a smooth path for the contemporary acquisitions of vast tracts of land (Karodia & Soni, 2014: 299; Haberl *et al*, 2009; Najam *et al*, 2007; Food and Agriculture Organisation of the United Nations, International Fund for Agriculture Development, United Nations Conference on Trade and Development, World Bank Group, 2010) for the production of agricultural commodities and mining (Nhemachena & Warikandwa, 2017), amongst other business ventures practiced on the continent. These land acquisitions constitute a package of ownership rights and use rights (through short term or long term leases or concessions). The land rights regime introduces the commoditisation of land (Karodia & Soni, 2014: 299). As such, the colonial land regime introduced the right to exclude and alienate land; practices which were alien under the African property rights regime (Warikandwa & Asheela, 2017). This focus on the individual and not collective land interests has thus led to the suffering of the peasantry who have been

alienated and evicted from their customary land in favour of the so-called “investments” supposedly brought by the multinational agriculture corporations.

The land acquisitions under the colonial land rights regime have been prompted by contemporary issues such as the need to realise food security (Karodia & Soni, 2014: 300), the emergence of new dietary habits (Bouis & Scott, 1996; Rosegrant & Ringler, 2000), land acquisition for finance and speculation purposes (Karodia & Soni, 2014: 300), biofuel production (*Ibid*), and Biochar production [Biochar was introduced and promoted as a major solution to global climate change, improving soil fertility, and addressing poverty by eminent persons such as Al Gore the former Vice President of the United States of America]. At the forefront of the business activities highlighted are multinational corporations who have nothing to lose but everything to gain from the land grabs. African governments have done little to rectify the colonial land rights regime that is not compatible with the best interests of African countries. A new approach needs to be adopted in so far as land rights are concerned. The reason for this proposal is outlined in the next section of this chapter which discusses the significance of recognising a human right to land as opposed to the use of land rights which are clearly tailor made to benefit Western multinational corporations.

A Need to Recognise a Human Right to Land in Africa

A significant number of the world's population is living in extreme poverty (Prosterman & Hanstad, 2006). Landlessness is attributed to the cause of this poverty (Wickeri & Kalhan, 2010). Access to land is therefore a fundamental component to eradicating poverty (De Janvry, 2001). Wickeri and Kalhan (2010) have pointed out that land is a cross-cutting issue (access to land affects many rights such as life, housing, work, food and water) yet there is no human right to land. De Janvry (2001: 17) argued that, “Land ownership can be a vital source of capital, which opens personal credit markets, leads to investments in the land, provides a social safety net, and transfers wealth to the next generation”. African policy makers appear to turn a blind eye to the significance of land

and elect to give priority to the so-called “investors” whose business operations in the agriculture sector in Africa have driven many to abject poverty. Without land, one cannot have food; let alone life and access to fundamental human rights.

Land is undoubtedly a crucial component for realising economic, social and cultural rights. It is inextricably linked to the right to food, the right to work, the right to life and is bound up with African communities’ identities, livelihood and survival. It is thus not surprising that peasants and poor African farmers vehemently object the conversion of vast tracts of land from subsistence farming purposes to large scale commercial mono-cropping. Land is a way of life (Diokno, 1987), and is more than simply a living space. The development of any community depends on the access to a means of livelihood, to education and health care, all which would be compromised if there is no land. It is therefore not difficult to see why land must be regarded as a fundamental human right (Plant, 1993: 10). Article 17 of the Universal Declaration of Human Rights (UDHR) provides that: “1. Everyone has the right to own property alone as well as in association with others, and 2. No one shall be arbitrarily deprived of his property”. Whilst reference to the term “property” can be inferred to include the right to own land, it must be questioned why land was not expressly stated in the UDHR. Article 11 of the International Covenant on Economic Social and Cultural Rights then sought to address the glaring omission in the UDHR by providing that States parties to the covenant must develop or reform “agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources.”

The First Protocol to the European Convention on Human Rights provides that: “No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law.” However, no specific mention is made to land. Interestingly, in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1953, emphasis is placed on the fact that no provision shall, “... in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest of the public or to secure the payment of taxes or

other contributions or penalties”. The wording of these human rights instruments is not formulated to ensure an absolute realisation of the right to land. It appears that the drafters of the human rights instruments were employing theories of realism and idealism as a basis for justifying the projected stranglehold on land by Western colonial forces that interestingly are also the superpowers behind the formulation of most human rights instruments in the world.

Article 21 of the American Convention on Human Rights provides that: “Everyone has the right to use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society ... No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest and in cases and according to the forms of established law.” Article 14 of the African Charter on Human and Peoples’ Rights states that: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.” Article 21(2) of the same Charter provides that: “In case of spoliation the dispossessed people shall have the right to lawful recovery of its property as well as adequate compensation.” None of the instruments cited above specifically mention land as a form of property. They focus on providing justification for limiting property rights. It is clear that the human rights instruments were crafted to cater for the land grabs currently taking in Africa and the rest of the world. Promises of just compensation for land taken for purposes of accommodating “foreign investors” in the agriculture sector have often not been honoured. With cases of State capture being rampant in Africa, corrupt government officials have been paid to subvert well-meaning national land redistribution and/or restoration policies aimed at addressing the injustices of the colonial past. However, because human rights instruments appear to provide justification for the land grabs, poor Africans have been left landless and subjected to chronic impoverishment.

There are some United Nations Declarations which have been specific in so far as the land issue is concerned. For example, the Declaration on Social Progress of 1969, recognises the social

function of property, including land, and advocates for forms of land ownership that ensure equal rights to property for all. The Food and Agriculture Organisation (FAO) and the International Labour Organisation (ILO) have also made notable attempts to give attention to land rights. For example, FAO adopted the Declaration of Principles and Programme of Action (also known as the Peasants Charter) during its World Conference on Agrarian Reform and Rural Development in 1979. The Peasants Charter calls for the substantial reorganisation of land tenure and land redistribution to landless peasants. It also calls for tenancy reform, regulation of (colonially enforced) changes in customary tenure and community control over natural resources.

The Social Policy (Basic Aims and Standards) Convention No. 117 of 1962 covers measure to improve the standards of living for agricultural producers. The convention advocates for the recognition of customary land rights and the control of alienation of land to non-agriculturalists. However, it is important to note that access to land is not limited to agriculture but goes beyond it. Limiting the alienation of land to non-agriculturalists may mean that some people will not realise the right to housing. The capitalist ideology of the convention is thus condemned. Another ILO instrument, the Indigenous and Tribal Peoples Convention No. 169 of 1989 is regarded as a fundamental tool in the evolution of concepts of land rights in international law. The convention 1) recognises the special relationship between indigenous people and their lands; 2) requires States to adopt special measures of protection on behalf of indigenous people; 3) provides safeguards against the arbitrary removal of indigenous people from their traditional land, with procedural guarantees; and 4) includes other provisions related to the transmission of land rights and respect for customary procedures. Regrettably, the choices of African governments undermine the objectives set out in ILO Convention No. 169. Governments elect to undermine the customary law land regime in favour of the Western oriented property rights regime so as to attract the so-called “foreign investors”. The net effect of this narrow minded approach is that future generations of Africans are subjected to poverty yet they could have taken care of themselves had they been empowered with land.

Land Rights in the Context of National Legislation

Land ownership at the national level is governed by the constitution and domestic laws. There are two basic principles that underline land ownership in Africa. The first principle is that of the right of private ownership which includes the right to use and enjoy land and to exclude others. It must be stated from the onset that the right to private ownership is contrary to the fundamentals of the customary land ownership regime which places emphasis on collective interests as opposed to individual interests. The customary law regime is only applicable subject to its conformity with the constitutional provisions on property. As such, most systems of land ownership in domestic law recognise and uphold the concept of private ownership of property. This is not surprising as most African countries have elected to prioritise regulatory flexibility in land ownership as a means of attracting the so-called foreign investors. Private ownership of property gives absolute control and exclusive rights to the owner of the land on the basis of legal, State-conferred ownership.

The other principle of land ownership underlying domestic land laws is the regalian doctrine. The doctrine provides that all land belongs to the State. As such, it is only the State that can grant approval for the transfer of land into private ownership. There is an apparent conflict between the right of private ownership and the regalian principle. The contemporary African society has placed significance on the need to ensure land reform (ideally land restoration) owing to the injustices perpetrated by the colonial regime. As such, to mitigate the negative effects of the two principles emphasis is now being placed on the ideological constructions of land being a resource with a social function, significance of ancestral land claims and the importance of collective rights to land use and/or ownership. The concept of the social function of land has been emphasised in Latin America, Africa and Asia. It seeks to balance the conflicting interests between the recognition of private land rights and fundamental aspects of public interests such as equity and equality. For example, section 25 of the South African Constitution provides that no one may be deprived of property except in terms of

the law of general application (section 25(1)). A person will only lose property when it is expropriated (section 25(2)) for a public purpose or in the public interest (section 25(2)(a)). The loss of property through expropriation is subject to compensation (section 25(2)(b)). The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of the affected, having regard to all relevant circumstances as set out in section 25(3) of the South African Constitution. Similar provisions exist in the Namibian and Zimbabwean constitutions. However, it is evident that this property rights regime favours the descendants of the colonialists in that it affords compensation for land that was forcibly and illegitimately seized from African indigenes. The compensation provisions tend to disregard the historical context informing forcible land grabs by colonialists in Africa. Serious questions have to be asked as to whether one can benefit from the proceeds of an unlawful and/or criminal conduct which puts such individual in a favourable condition as compared to the victim of the crime (Warikandwa & Asheela, 2017). To accept that one can benefit from the proceeds of an unlawful conduct is to justify unjust enrichment. Whilst this may be a difficult issue to address in an era in which African governments are eager to be seen as “investor friendly”, in most instances in a manner that is prejudicial to their citizens, it is important that well-meaning African academics expose the hypocrisy laden in the post-colonial property rights regime in Africa.

The hypocrisy underlining the contemporary property rights regime in Africa is exposed by the fact that even though there is provision for compensation in lieu of expropriation, minority owners of vast tracts of fertile and resource rich land have not been willing to sell their land. It is evident that the minority owners of land understand the value of the land as compared to the compensation they would get. This in itself underscores the importance of land to the black majority who are landless and impoverished in Africa. Section 25(4)(a) of the South African Constitution makes provision for land reform. The State should be committed to land reform and to reforms bringing about equitable access to all natural resources belonging to South Africa. The question though is, should emphasis

be placed on land reform or land restitution. Land should be understood as a fundamental right which must be inalienable. Many Africans have suffered significant emotional and economic loss as a result of the forced colonial land seizures. Surely for the wounds of the brutal colonial past to be healed, restorative justice must be seen to take place. Africa cannot continue with the current land ownership and development systems which reflect the political and economic conditions of the colonial era. One would expect that several years after most African countries' independence, land reform and/or ideally land restoration policies must have been robustly pursued to redress injustices of the colonial past, foster national reconciliation and stability aimed at promoting an indigenous people driven economic growth. On the whole, household welfare and poverty alleviation would be gradually realised. African policy makers and academics should thus have been focusing on promoting research which places emphasis on a land regulatory regime which seeks to address:

- a) The injustices of racially based dispossession;
 - b) The inequitable distribution of land ownership;
 - c) The need for security of tenure for all;
 - d) The need for sustainable use of land;
 - e) The need for rapid release of land;
 - f) The need to recognise land as a fundamental human right;
- and
- g) The need to administer public land in an effective manner.

Sadly, the Western trained and indoctrinated African policy makers and academics have become blinded and cannot see beyond the next pay check and the size of their ballooning stomachs. The policy makers and academics regard the Western property rights regime as the panacea to attracting "foreign investment" which they perceive to be the key to Africa's industrialisation. Far be it from the truth as these intellectually bankrupt policy makers and academics, who considerably lack sound critical analytical skills, continue to misdirect Africans to the detriment of the continent they inhabit. Land ownership is central to realising economic growth and poverty

eradication. It is therefore the duty of national governments to ensure that their citizens access land as a tool for economic emancipation. Ceding land rights to multinational corporations will continue to impoverish many innocent African peasants and condemn the continent to an economic abyss.

Ancestral land rights, the collective ownership of land, customary land rights and “time immemorial” possessions of land by African indigenes should not be regarded as inferior rights to regalian and private individuals’ ownership rights. In a large number of countries, there are conflicts between private land ownership and tenure provisions allowed for under the customary law of the indigenous peoples and those provided for by statutory laws. In Africa, this conflict was first generated through colonial models that tended to provide for dual systems of ownership, with settlers having private rights to land and indigenous Africans enjoying communal rights. This distinction has been maintained to greater or lesser degrees in various countries. In Southeast Asia the growth of the logging industry in recent years has led to pressure on forest dwellers who until recently had exclusive occupation of the land under customary law. In many countries in the world, there are conflicts between private land ownership and tenure provisions allowed for under the customary law of the indigenous peoples and those provided for by statutory laws. In Africa, this conflict was first generated through colonial models that tended to provide for dual systems of ownership, with settlers having private rights to land and indigenous Africans enjoying communal rights.

Issues of land tenure and titling have a particular importance for African indigenes. The indigenous rights movement worldwide has accepted that indigenous peoples have the basic right to manage their lives, development and resources in a distinct manner within the framework of a multicultural state. This is a “special rights” approach that links the recognition and enjoyment of these rights to a particular ethnic or cultural identity. Such “special rights” have been approached conceptually in different ways. One way is to argue that indigenous peoples have “original” or “immemorial” rights to their lands and resources, in that they never sacrificed these rights after conquest and colonization. It is these concepts of original and native

title to land that are now driving the indigenous rights movement in such places as Australia and Canada.

It is also important to place emphasis on the historical land rights of indigenous communities, namely the ancient land titles that were issued during the colonial period or after independence. This approach has been important in countries such as Colombia, Guatemala and Mexico, where ancient land titles can be jealously guarded. A third way is to place the emphasis on discrimination and on the need to combat the injustices of the past by adopting special measures to favour indigenous access to the land. Further, indigenous peoples should be specially favoured in land access, distribution and purchase programs. In various countries, individuals or groups are demanding the restitution of land they believe was unlawfully taken from them or payment of compensation *in lieu* of the land. Such claims have been common in Central and Eastern Europe, for example, where land had previously been subject to collectivisation. Similarly, the issue of the return of land in Israel or the Occupied Territories to Palestinians who had owned it has long been a bitter issue.

Basic to international human rights law are provisions related to equality and non-discrimination. Article 2(2) of the ICESCR, for example, provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):

State Parties must assure everyone within their jurisdiction effective protection and remedies through the competent tribunals and other State institutions, against any acts of racial discrimination which violate his human rights . . . as well as the right to seek from such

tribunals just and adequate reparation or satisfaction for any damages suffered as a result of such discrimination.

These provisions apply to ownership of land as well as security of tenure of land. One of the bases on which restitution has been claimed or provided has been discrimination; that land had previously been taken from an individual or group because of their racial, ethnic or other identity. A person or community dispossessed of property as a result of past racially discriminatory laws or practices should be entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The right to restitution should be guided by principles of fairness and justice. It is therefore important to identify the different ways in which people have been prejudiced through dispossession:

- a) dispossession leading to landlessness;
- b) inadequate compensation for the value of the property; and
- c) hardships which cannot be measured in financial or material terms.

A restitution claim should therefore be accepted where the claimant was dispossessed of land under or for the object of furthering the object of a racially discriminatory law.

Recommendations

A number of recommendations will be advanced in light of the arguments advanced in this chapter. The recommendations are as follows:

- a) The land rights regime currently prevailing in Africa must be significantly revised as it favours multinational agriculture corporations at the expense of African indigenes. Land must be made accessible to African peasants to promote subsistence farming in the process eradicating poverty. The current land rights regime does not protect the interests of peasants as it favours the interests of the so-called investors who maximize profits for themselves and impoverish the majority of Africans.

b) The human right to land must be recognised in the ACHPR and national constitutions in Africa. Access to land is key to the realisation of many fundamental human rights and should thus be considered as a fundamental human right.

c) Significant emphasis should be placed on land restoration as opposed to land reform. Restorative justice must be realised in Africa for the atrocities perpetrated by colonial regimes on African indigenes. Failure to ensure restorative justice in Africa is likely to encourage militarisation amongst victims of colonial injustice and their descendants in the process fuelling forcible “land grabs” by African indigenes.

d) Recurriculation of property law modules in Africa must be urgently pursued to train a crop of intellectually sound policy makers and property law specialists who are alert to the vagaries of colonial regimes which seek to continue benefiting at the expense of masses of impoverished Africans on the continent.

e) The customary law regime must be given elevated recognition in the property law regime of Africa rather than being subjected to the individual/private property rights system and the State ownership of land approach. With State capture dominating the African political environment, property ownership by the State now bears little fruits for the masses as corrupt African politicians work in cahoots with officials of multinational corporations to subvert the best interests of the nation.

Should the above recommendations be implemented by African countries, many Africans are likely to be self-subsistent and will emerge out of poverty. It remains to be seen if there is a political will and commitment amongst African policy makers to overhaul the property law regime in pursuit of African indigenes’ best interests. Africans must realise that they have the potential to manage their own resources in order to grow their economies in the best interests of their people.

Conclusion

There is no doubt that land ownership is a fundamental right which the colonial land rights regime has deliberately elected not to recognise. Land is fundamental to the realisation of many rights such as rights to housing, food, work, water, and life, amongst others. As such, land ownership must now be regarded as an indivisible human right. If African policy makers focus on land and its role in fulfilling international human rights, regional instruments such as the ACHPR would start recognising a human right to land. It is evident that those without land are chronically poor hence maintaining a land rights regime that favours multinational corporations who are grabbing land for capitalist agendas is ill conceived. African governments must thus free themselves from the abuse of multinational corporations grabbing land in Africa and revise their land rights regime in favour of African indigenes. African academics must awaken from their deep slumber and advocate for a new property rights regime for Africa, failure which, Africa shall continue sinking into chronic poverty and will never realise industrialisation or eradicate poverty. Africa must unyoke itself from economic slavery.

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One of the fundamental challenges in deconstructing, rethinking and remaking the world from a Pan African vantage point is that some captives have tended to delight in the warmth of the [imperial] predator's mouth. In other words, some captives forget that the imperial predator's mouth gets warm because empire is eating and heating up from prey on the continent. *(De-) Militarisation, Transnational Land Grabs and Restitution in an Age of the New Scramble for Africa: A Pan African Socio-Legal Perspective* is a book that knocks on key aspects relating to land, militarisation, a Post-African World Order and a chaotic Post-God World Order, which require critical scholarly and policy attention in the quest to free Africa from centuries-old imperial depredations. The book carefully navigates the imperial entrapments which are designed to focus African attention only on decolonising African minds without also engaging in the [imperially more unsettling] decolonisation of African materialities.

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